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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. ~~75~~-95

STATE OF TENNESSEE; WINFIELD DUNN, as Governor of the State of Tennessee and Commander-in-Chief of the National Guard of the State of Tennessee; TENNESSEE AIR NATIONAL GUARD; TENNESSEE AIR NATIONAL GUARD, 134th Air Refueling Group (TAC); MAJOR GENERAL WILLIAM C. SMITH, as Adjutant General of the National Guard of the State of Tennessee; COLONEL ROBERT W. AKIN, as Commander of the 134th Air Refueling Group; LIEUTENANT COLONEL DAVID L. CARTER, as Commander of the 134th Combat Support Squadron; LIEUTENANT COLONEL BOB ARR, as Commander of the 151st Air Refueling Squadron; LIEUTENANT COLONEL WILLIAM D. ASBURY, as Commander of the 134th Supply Squadron; LIEUTENANT COLONEL THOMAS P. WEBB, III, as Commander of the 134th Camron Squadron; and LIEUTENANT COLONEL MARSHALL C. PIERCE, as 134th Director of Operations,
Petitioners,

v.

BILLY DON DUNLAP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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IN THE

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OCTOBER TERM, 1974

No. _____

STATE OF TENNESSEE; WINFIELD DUNN, as Governor of the State of Tennessee and Commander-in-Chief of the National Guard of the State of Tennessee; TENNESSEE AIR NATIONAL GUARD; TENNESSEE AIR NATIONAL GUARD, 134th Air Refueling Group (TAC); MAJOR GENERAL WILLIAM C. SMITH, as Adjutant General of the National Guard of the State of Tennessee; COLONEL ROBERT W. AKIN, as Commander of the 134th Air Refueling Group; LIEUTENANT COLONEL DAVID L. CARTER, as Commander of the 134th Combat Support Squadron; LIEUTENANT COLONEL BOB ARR, as Commander of the 151st Air Refueling Squadron; LIEUTENANT COLONEL WILLIAM D. ASBURY, as Commander of the 134th Supply Squadron; LIEUTENANT COLONEL THOMAS P. WEBB, III, as Commander of the 134th Camron Squadron; and LIEUTENANT COLONEL MARSHALL C. PIERCE, as 134th Director of Operations,
Petitioners,

v.

BILLY DON DUNLAP,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the instant case.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced as Appendix A to this petition. The memorandum opinion of the United States District Court for the Eastern District of Tennessee is reproduced as Appendix B to this petition.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1975. This petition for certiorari is timely filed within ninety (90) days of that date. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The single issue presented for determination is whether or not a federal court may review a military commander's decision to deny a request for re-enlistment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions:

32 U.S.C. § 709(a) (Supp. 1974), provides:

> "Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in (1) the administration and training of the National Guard; and (2) the maintenance and repair of supplies issued to the National Guard of the armed forces.

32 U.S.C. § 709(b) (Supp. 1974) provides:

> Except as prescribed by the Secretary concerned, a technician employed under subsection (2) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

32 U.S.C. § 709(e)(1) (Supp. 1974) provides:

> Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned: (1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned.

32 U.S.C. § 709(e)(6) (Supp. 1974) provides:

> (6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment.

32 U.S.C. § 709(e)(5) (Supp. 1974) provides:

> (5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned."

STATEMENT OF THE CASE

On January 11, 1974, the respondent, Billy Don Dunlap, filed a complaint against certain officers in the Tennessee Air National Guard, certain units of the Tennessee Air National Guard, the Governor of Tennessee, and the State of Tennessee. (Appendix D) The complaint asserted that it was founded upon the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States and upon 42 U.S.C. §§ 1983, 1985(3), and 1986. The complaint also sought a judgment to declare that a commander's prerogative in respect to re-enlistment of enlisted personnel in the Tennessee Air National Guard to be unconstitutional and also sought injunctive relief to prohibit the commander of the respondent from exercising that prerogative. Basically, the respondent sought to adjudicate the fact that his commander had determined that it was not in the best interests of the Tennessee Air National Guard to allow him to re-enlist at the termination of his current period of enlistment. (On December 8, 1972, the last day in his enlistment period, the respondent had been issued orders discharging him from the Tennessee Air National Guard.)

In addition to being a member of the Tennessee Air National Guard, the respondent had been employed as a Civil Service technician. His employment was not unlike that involved in the case of *Baum v. Zuckert*, 342 F.2d 145 (6th Cir. 1955), concerning the Air Force Reserve Technician Program, in which that Court noted that the program was to provide active Air Force Reserve units:

> ". . . which are composed chiefly of personnel who train only a few days each month and two weeks in the summer, with a core of highly trained personnel whose full-time civilian jobs coincide with their military job." At page 146.

After the termination of his enlistment, the respondent was notified that his employment as a Civil Service technician would be terminated thirty days from the date of notification as he no longer met a condition of his employment; that is, maintaining his status as an active member of the Tennessee Air National Guard.

The respondent initiated the present action one year less a day from the termination of his Civil Service technician employment. The petitioners responded by filing a motion to dismiss and alternative motion for summary judgment (Appendix C) to which the respondent filed a response.

The United States District Court for the Eastern District of Tennessee, Northern Division, Robert L. Taylor, Judge, granted the petitioners' motion to dismiss with an accompanying memorandum opinion. The respondent perfected an appeal from that decision and on April 17, 1975 the United States Court of Appeals for the Sixth Circuit reversed and remanded the lower court holding that ". . . decisions which are made for non-military reasons involving no application of military expertise may well be outside the boundaries of the doctrine of nonreviewability." Appendix A, page A-5.

From this decision, the petitioners now seek review by way of a writ of certiorari from this Honorable Court.

REASON FOR GRANTING THE WRIT

The decision of the Court of Appeals has departed from the accepted and usual judicial standard for review of military decisions and has apparently adopted a standard which, if adopted, would affect the complete military establishment and thus should only be adopted by this Honorable Court. Further, if the decision of the Sixth Circuit is allowed to stand, it would result in the potential for the review of every military decision at least to the extent that the threshold question of whether or not the decision was indeed a military decision would have to be litigated. If the decision were glossed so to apply it only to military decisions which might affect Civil Service Technicians' employment, it would create an unwieldy bifuracted system of judicial review of military decisions which could conceivably wreck havoc in the Reserve and National Guard military components.

ARGUMENT

As noted above, the respondent's employment was not unlike that involved in the case of *Baum v. Zuckert*. That is, in order to maintain his position as a Civil Service technician, he was required to maintain his position as an enlisted man with the Tennessee Air National Guard. When the respondent ceased to hold a position in the Guard, he was notified that his employment as a technician would be terminated pursuant to the provisions of 32 U.S.C. §709(e)(1) (Supp. 1974), which, *inter alia*, provides that a technician who is separated from the Guard ". . . shall be promptly separated from his technician employment by the Adjutant General of the jurisdiction concerned."

As the district court in the instant case aptly noted, the principal allegation of the respondent was that the discretion vested in his commanding officer to deny re-enlistment is *ipso*

facto exercised in an arbitrary and capricious manner, since the discretion is not particularly delineated. This allegation in itself would indicate that the decision was a military one within the discretion of the commander.

There is no allegation in the respondent's complaint that the military failed to follow its own regulations. Where military officials have violated military regulations, courts have not been reluctant to review such actions. *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969); *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969); *Van Bourg v. Nitze*, 388 F.2d 577 (D.C. Cir. 1967); *Bluth v. Laird*, 435 F.2d 1065 (4th Cir. 1970); *Noyd v. McNamara*, 378 F.2d 538 (10th Cir. 1967), *cert. denied*, 389 U.S. 1022, 88 S.Ct. 593, 19 L.Ed. 667. There is no right to re-enlist in the armed services under the particular circumstances presented here. See *O'Callahan v. United States*, 451 F.2d 1390 (Ct. Cl. 1971); *Davis v. United States*, 196 Ct. Cl. 517 (1971), *cert. denied*, 405 U.S. 1046, 92 S.Ct. 1313, 31 L.Ed. 2d 589 (1972). In *Harmon v. Brucker*, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed. 2d 503 (1958), it was decided that a review of military matters could be made in order to determine whether or not a decision by military authorities was made within the scope of statutory and regulatory authority. Here, there was no allegation that the decision was made outside the scope of military authority.

In *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), the Court briefly reviewed the history of judicial review of military decisions. In *Reaves v. Ainsworth*, 219 U.S. 296, 31 S.Ct. 230, 55 L.Ed. 225 (1911), this Court declined to grant judicial review to an allegation that the decision of an Army medical board was arbitrary and capricious. Apparently, such review would have entailed, *inter alia*, a determination of the plaintiff's fitness as an officer. As mentioned above, courts have granted judicial review in cases where it was alleged that the military did not obey its own regulations. Courts have also granted review to claims of unconstitutionality of statutes, ex-

ecutive orders, and regulations. See *Morse v. Boswell*, 289 F. Supp. 812 (D.C. Md. 1968), affirmed in 401 F.2d 544, *cert. denied* 393 U.S. 1052, 89 S.Ct. 687, 27 L.Ed. 2d 694 (1969); *Goldstein v. Clifford*, 290 F. Supp. 275 (D.C.N.J. 1968); *United States v. Flower*, 452 F.2d 80 (5th Cir. 1971). Courts have indicated their authority to review the discretion of post commanders in restricting the distribution of printed materials. See *Dash v. Commanding General, Ft. Jackson, South Carolina*, 307 F. Supp. 849 (D.C.S.C. 1969), affirmed [*Yahr v. Resor*], 431 F.2d 690 (4th Cir. 1970), *cert. denied* [*Dash v. Commanding General, Ft. Jackson, South Carolina*], 401 U.S. 981, 91 S.Ct. 1192, 28 L.Ed.2d 333 (1970). The Second and Seventh Circuits have declined review in haircut cases. *Anderson v. Laird*, 437 F.2d 912 (7th Cir. 1971); *Raderman v. Kaine*, 411 F.2d 1102 (2nd Cir. 1969). The Fifth Circuit appeared to reach the merits of a haircut regulation in *Doyle v. Koelbl*, 434 F.2d 1014 (5th Cir. 1970), although a dismissal was affirmed for failure to exhaust military administrative remedies. In *Arnheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970), the Court refused to review the question of why an officer was relieved of command of his ship. In *Cortright v. Resor*, 447 F. 2d 245 (2nd Cir. 1971), the transfer of a serviceman was not reviewed even though it was alleged to have been made because of protected First Amendment activities. Court-martial convictions have traditionally been held subject to collateral habeas corpus review. Collateral effects of court-martial convictions have been held to be subject to review. See *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965); *Smith v. McNamara*, 395 F.2d 896 (10th Cir. 1968); *Angle v. Laird*, 429 F.2d 892 (10th Cir. 1970).

The allegations in the instant case meet none of the previous criteria established for judicial review of military decisions. The determination of the Court of Appeals for the Sixth Circuit that Courts should determine the threshold question of whether or not a decision is a military decision in each case is a substantial departure from the aforementioned criteria for judicial review.

A doctor who was drafted because of his medical expertise sued to have the Army ordered to utilize him in a medical position and to award him a commission. The doctor had claimed the Fifth Amendment privilege when questioned concerning his membership in certain "subversive" organizations. The government's position in both the district court and Court of Appeals was that the doctor, although drafted into the military because of his medical expertise, could be utilized in any position that his commanders saw fit. Both the lower courts agreed with the government's position. However, when the case reached this Honorable Court, the government agreed that the statutes required the doctor to be used in a medical capacity, but argued that he was not entitled to a commission and that he could be assigned to any particular duties within the medical field. This Court agreed and stated that it would not review assignments since these were peculiarly in the realm of military discretion. *Orloff v. Willoughby*, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953).

The only colorable claim in the respondent's complaint was that the determination of his commander that he should not be allowed to re-enlist was a sham to deny him employment in his Civil Service Technician capacity without any opportunity for administrative review from his dismissal as a Civil Service Technician which followed automatically. 32 U.S.C. § 709(e)(1) (Supp. 1974) In *Boling v. Rockefeller*, 277 N.Y.S.2d 168 (1967), certain individuals were discharged prior to the termination of their current periods of enlistment. The State court, though utilizing criteria for judicial restraint different than those in the instant case, stated that the fact that the discharge carried with it the concomitant loss of a civilian position did not clothe the courts with any greater authority over the subject matter. The petitioners insist that that determination is applicable in the instant situation.

The United States Court of Appeals for the Fifth Circuit has surveyed the extent of judicial review of military decisions and set forth certain guidelines to be utilized in determining whether judicial review was appropriate. *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). Two primary prerequisites were indicated: the first being an allegation of the deprivation of a constitutional right or an allegation that the military did not follow the controlling statutes and regulations; the second being an exhaustion of military administrative remedies. At page 201. In the instant case, the plaintiff asserts the deprivation of a constitutional right. However, the Fifth Circuit aptly noted that even where there was an allegation of a deprivation of a constitutional right, judicial review would not be automatic without the weighing of certain additional factors.

The first matter is the nature and strength of the challenge to the military determination. In the instant case, the only challenge to the military determination was a general challenge to the discretionary powers vested in a commanding officer to determine what is in the best interests of the Tennessee Air National Guard. The respondent did not attack the decision of the military commander as it effected a traditional military purpose. The attack was founded on the idea that the discretion vested in a commander was so broad as to render any exercise of that discretion to be arbitrary and capricious. The second factor to be weighed is the potential injury to a plaintiff if judicial review is denied. In the instant case, the respondent alleged absolutely no injury in regard to his duties in the Tennessee Air National Guard.*

The Fifth Circuit also noted that a Court should consider the effect which judicial review would have upon the military

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* The respondent asserted for the first time in his brief in the Court of Appeals that he had accrued approximately seventeen and one-half years of creditable service toward retirement and had a reasonable expectation that he would be allowed to re-enlist and complete two and one-half additional years so that his retirement entitlements could be vested.

function and the extent to which military expertise and discretion is involved in the determination. It is this particular matter which is the crux of the prayer for certiorari in the instant case. Basically, the Sixth Circuit held that courts must make a preliminary determination in each case seeking judicial review of a military decision. That determination would be whether or not the decision was a military decision or merely made by a military decision-maker. Should this view prevail, the petitioners envision a potential for great abuse of the judicial system by disgruntled servicemen who may seek judicial review of any decision made by a military superior. A Court would then have to determine the threshold question of whether or not the decision was a military decision for a military purpose. This, of course, could result in the litigation of the merits of the claim itself; the military could conceivably be forced to defend each of its decisions, at least to the extent of proving that the decision was made for a military purpose, rather than for a "secular" one.

The petitioners would respectfully submit that the decision of whether to allow an enlisted member of the Armed Services to re-enlist is a peculiarly military decision. In reaching such a determination, a commander must determine that the person had a particular military occupational specialty that would be necessary for the completion of the mission of his unit. He would of necessity have to consider the qualifications of the applicant for enlistment or re-enlistment along with the qualifications of other persons whose records indicate experience and expertise in that particular military occupational specialty. Further, a military commander must take into consideration the effect that the enlistment or re-enlistment of a particular individual would have on the morale and efficiency of his unit. None of these generally described determinations lend themselves readily to judicial review and all are peculiarly within the realm of a commander's military discretion.

As this Honorable Court noted in *Orloff v. Willoughby, supra*:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters." At pages 93-94.

CONCLUSION

For the foregoing reasons, the petitioners respectfully pray that the writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit so that this Court might review the decision of the Court of Appeals.

Respectfully submitted

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APPENDIX

APPENDIX A

No. 74-1566

United States Court of Appeals
For the Sixth Circuit

Billy Don Dunlap,
Plaintiff-Appellant,
v.
State of Tennessee, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Tennessee

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Decided and Filed April 17, 1975

Before: Edwards, Circuit Judge; Peck, Circuit Judge; *Duncan, District Judge.

Duncan, District Judge. This is an appeal from an order of the District Court dismissing plaintiff's complaint for injunctive, declaratory and pecuniary relief for defendants' alleged violation of plaintiff's rights under the Fourteenth Amendment to the United States Constitution. The complaint was brought by Billy Don Dunlap against various officials associated with the Tennessee Air National Guard. The District Court held that this case, involving as it does a decision by the military, does not raise questions which may properly be reviewed by a civil court.

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* The Honorable Robert M. Duncan, Judge, United States District Court for the Southern District of Ohio, sitting by designation.

Prior to the events which led to his filing this 42 U.S.C. § 1983 action in the District Court, appellant had a dual relationship with the Tennessee National Guard. He was employed by the National Guard as a technician pursuant to the Technicians Statute, 32 U.S.C.A. § 709 (Supp. 1974). National Guard technicians are charged with the administration and training of National Guard personnel and with the maintenance and repair of Guard supplies.[1] Appellant was also a member of the Tennessee Air National Guard. His membership in the Guard was a statutory prerequisite to his continued employment as a technician.[2] Knowing that his term of enlistment as a member of the Guard would expire on December 8, 1972, appellant sought re-enlistment through the appropriate channels.

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[1] Subsection (a) of the Technicians Statute, 32 U.S.C.A. § 709 (a) (Supp. 1974), provides:

> Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in—
>
> (1) the administration and training of the National Guard; and
>
> (2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

[2] 32 U.S.C.A. § 709(b) (Supp. 1974) provides:

> Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position. Section (e)(1) provides:
>
> Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—
>
> (1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned.

However, he was not permitted to re-enlist. The complaint alleges that he was informed by his commanding officer, Colonel Robert W. Akin, that Akin in the exercise of his discretion had decided that it was not in the best interests of the Guard to permit his re-enlistment. Appellant persisted in his efforts and was notified that Akin had decided to convene a board of officers to advise him as to the matter of appellant's re-enlistment. Appellant requested, and was refused, a more detailed statement of the reason for Akin's decision and permission to appear before the board of officers to refute any charges which had been made against him. The board met and agreed with Colonel Akin's decision. Appellant thereby lost his Guard membership without ever learning the reason it was believed not to be in the best interests of the Guard to permit his re-enlistment. After receiving thirty days notice, as required by the Technicians Statute,[3] his employment as a technician was terminated on January 12, 1973. The sole reason given for the termination was his lack of membership in the Guard. Appellant took his statutory[4] appeal to the adjutant general. The District Court treated this appeal as having been decided adversely to appellant; this Court does the same.

Paragraph 14 of the complaint alleges that Colonel Akin's decision was

> purposeful and intentional action that was calculated to culminate in the plaintiff's discharge from his technician's job and have the further result of placing the plaintiff in

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[3] 32 U.S.C.A. § 709(e) (6) (Supp. 1974) provides:

> (6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment.

[4] 32 U.S.C.A. § 709(e) (5) (Supp. 1974) provides:

> (5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned; and

> such a position as would either frustrate or deny any opportunity for him to effectively pursue an administrative remedy.

In a similar vein, paragraph 16 alleges that the action by the board of officers was a

> continuing and further effort to eliminate the plaintiff from his position as a technician and to frustrate or deny any opportunity for him to effectively pursue an administrative remedy.

In finding that "under the circumstances described here, the actions of Colonel Akin and the advisory board and the subsequent appeal to the adjutant general are not subject to review by a civil court," the District Court relied upon the principle that

> judges are not given the task of running the Army. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters. . . .

Orloff v. Willoughby, 345 U.S. 83, 93 (1953). *Cf. Parker v. Levy*, 417 U.S. 733 (1974); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971); *Gianatasio v. Whyte*, 426 F.2d 908 (2d Cir. 1970); *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969); *Baum v. Zuckert*, 342 F.2d 145 (6th Cir. 1955).

The primary rationale for the doctrine of nonreviewability of military decisions lies in the civil courts' "unwillingness to second-guess judgments requiring military expertise." *Mindes v. Seaman*, 453 F.2d 197, 199 (5th Cir. 1971). In determining the applicability of the doctrine in any particular case, the threshold question must necessarily concern the nature of the decision sought to be reviewed rather than merely the identity of the de-

cision-maker. In one sense, all decisions by military personnel are military in nature. But decisions which are made for non-military reasons involving no application of military expertise may well be outside the boundaries of the doctrine of non-reviewability.

There may have been a military justification for Colonel Akin's refusal to permit appellant's re-enlistment. Such a justification might, for example, relate specifically to appellant's lack of qualification for continued military service or more generally to a military decision to decrease the ranks of the Guard by limiting re-enlistments. Colonel Akin has declined appellant's requests that he state more precisely the military reason for his decision. Appellant in his complaint has filled this void by alleging that the decision was made not for military reasons but to terminate appellant's technician employment in such a way as to deny him the administrative recourse he alleges he would have had if the military had acted directly to terminate this employment.

The Technicians Statute, 32 U.S.C.A. § 709(e)(3) (Supp. 1974), provides that the *adjutant general* may terminate a technician's employment *for cause*:

> (3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned.

In order for this provision to have meaning, the unreviewable discretion of Guard officials to permit or refuse re-enlistments must not extend to decisions which are made for the purpose of affecting a guardsman's technician employment. If the concern of the Guard is in the first instance with a guardsman's technician employment, the statute provides that it is the adjutant general, not the commanding officer, who must act, and it provides that he must act for cause. Appellant's "allegations—which we must construe most favorably to the [appellant] at this stage of the

litigation—do raise a genuine issue as to his interest in the continued employment" as a technician with the Tennessee Air National Guard. *Perry v. Sindermann*, 408 U.S. 593, 599 (1972).

The standard for judging the sufficiency of a complaint on a motion to dismiss is a familiar one. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The complaint must not be dismissed "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). We hold that the District Court erred in dismissing the complaint before appellant had an opportunity to prove his allegation that Colonel Akin's decision was made for other than military reasons.

Reversed and remanded.

APPENDIX B

In the United States District Court for the
Eastern District of Tennessee
Northern Division

Billy Don Dunlap,

v.

Colonel Robert W. Akin, et al.

} Civ. 3-74-15.

MEMORANDUM

This action is presently before the Court on defendant's motion to dismiss or, alternatively, motion for summary judgment.

Plaintiff's action arises under 42 U.S.C. § 1983 et seq.; jurisdiction accordingly lies under 28 U.S.C. § 1343.

In his complaint, plaintiff asserts that he was enlisted in the Tennessee Air National Guard, 134th Air Refueling, as an Air Guard technician from August 13, 1967 through January 12, 1973. Plaintiff's term of enlistment with the Air National Guard expired on December 8, 1972. Plaintiff was informed by a Colonel Robert W. Akin, Commander of the 134th Air Refueling Group of the Tennessee National Guard, prior to plaintiff's effective termination date that, in exercising his discretion, he had concluded that it was not in the best interest of the Guard to grant plaintiff's reenlistment. Thereafter, a board of officers was convened by Colonel Akin to further advise him whether plaintiff should be permitted to reenlist. Plaintiff's request to appear before this advisory board was denied. The board, in concurring in Colonel Akin's conclusion, recommended that

plaintiff not be permitted to reenlist. Plaintiff presently contends that he has never received a copy of any of the charges offered against him or any formal declaration from the advisory board advising him why his continued employment with the unit was not in the Guard's best interest.

Pursuant to the recommendation of the board, and the opinion of Colonel Akin, plaintiff received an order on December 8, 1972, discharging him from the Tennessee Air National Guard and as a Reserve of the Air Force. The reason given in the order for such termination was the expiration of plaintiff's term of enlistment.

Shortly thereafter, on December 13, 1972, plaintiff received a letter from Colonel Akin, notifying him that his employment as a technician would be terminated, effective 30 days from the date of receipt of said letter, due to his loss of membership in the Tennessee Air National Guard. This action was taken pursuant to the statutory directive of 32 U.S.C. § 709(e)(1) (Supp. 1973), which provides, in part:

"709(e)(1) * * *

". . . [A] technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned."[1]

[1] Defendants have responded that the joinder of appropriate federal officials is required as plaintiff's action necessarily addresses itself to Section 709 *et seq.* Plaintiff, however, fails to attack the validity of Section 409 but instead attacks only the discretion or perogative allegedly vested in a commander to decide whether it is in the best interest of the Air National Guard to allow a member to reenlist. Plaintiff's complaint is thus directed only to acts of a member of a state militia, not a federal official.

Pursuant to Section 709(e)(3) (Supp. 1973), plaintiff filed "on or about the 22nd day of January, 1973," an appeal with the state adjutant general.[2] Although plaintiff has not stated what appellate disposition was taken by the adjutant general, it is presumed that an adverse decision was rendered, affirming the action taken by Colonel Akin in denying plaintiff's reenlistment.

Plaintiff's sole allegation is that the discretion vested in the commanding officer to deny reinlistment is necessarily exercised in an arbitrary and capricious manner since such discretion is not couched in sufficiently descriptive standards. Thus, in absence of any definitive guidelines to follow in denying an applicant the opportunity to reenlist, the commanding officer's decision is necessarily arbitrary and capricious.

Although plaintiff requests a jury trial in this action, at this stage in the proceeding it appears that the preliminary question is one of law alone: Can the Court review the actions of a com-

The employment status of a technician with the Guard is an admixture of federal and state characteristics. See generally, *Calhoun* v. *Doster*, 324 F.Supp. 736 (M.D.Ala. 1971). Principally, however the congressional intent was to vest in the State Adjutant General the authority to employ and terminate the services of technicians. 32 U.S.C. § 709(c). Thus, the operative focus of the personnel relationship is between the state and the enlisted man. This congressional intent was reiterated in *Calhoun*, 324 F.Supp. at 739, n. 4:

"This requirement [Section 709(c)—'adjutant generals . . . to employ and administer the technicians'] is intended to achieve two purposes: (a) recognize the State character of the Guard and (b) meet the requirement of giving the adjutant-generals (who are state officers) the statutory function of employing federal employees." 1968 Cong. and Adm. News, p. 3330.

For additional discussion of the state's role, see *Anselmo* v. *Ailes*, 235 F.Supp. 203 (D.C.N.Y. 1964), aff'd 344 F.2d 607 (2nd Cir. 1965).

[2] 32 U.S.C. § 709(e) (5) (Supp. 1973) provides:

"(5) A right to appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned."

manding officer of a state militia in denying a currently enlisted technician his request for reenlistment?

Having examined the law and the facts, it is the considered opinion of the Court that, under the circumstances described here, the actions of Colonel Akin and the advisory board and the subsequent appeal to the adjutant general are not subject to review by a civil court.

Tennessee Code Annotated, Title 7, Section 105 (1973) recognizes that "[t]he governor of this state shall be the commander-in-chief of the military forces," and, in addition to his enumerated powers, *Id.* § 105(a)-(e), is granted "further and general powers . . . as may be necessary."

Likewise, the Air National Guard Regulation 39-10, ¶ 4, provides:

> "4. *Separation Authority*. The authority to separate members from the Air National Guard rests with the State. The authority to separate members from their Reserve of the Air Force enlistments rests with the Secretary of the Air Force, and is delegated to the State adjutant general, as indicated in this regulation, with authority to the commanders of wings, separate groups, or separate squadrons."

Although the Court is not readily aided in its disposition by a plethora of case law, it is guided by traditional principles that govern the civil review of military proceedings. As plaintiff notes, *Baum v. Zuckert*, 342 F.2d 145 (6th Cir. 1955), is not factually analogous to the case at bar since in that case the plaintiff was dismissed from active service in the Air Force "for reasons within his control," and the Court in that instance was reviewing personnel action of the Civil Service Commission. Accordingly, the scope of review for the district court was drawn in sharper focus than the review presently before this Court. *Baum* does evidence, however, the judiciary's historical

reluctance to review administrative actions of the military. This principle of judicial discretion should find no less support where the district court is reviewing the administrative proceedings of a state, rather than a federal, militia. Additionally, it should be noted that in *Baum*, plaintiff's employment was terminated as a result of his reassignment to inactive duty. Here, however, plaintiff was not discharged prior to the end of his enlistment, but merely was denied permission to reenlist. The distinction appears to be more than merely formal, as the scope of review of a discharge of an enlisted man prior to the expiration of his term of enlistment "without honor" would indeed be different from the more routine discharge and denial of reenlistment at the expiration of this term. Since civil review has not been recognized in the former instance, it is difficult to understand effecting such review in the latter instance. See, e.g., *Boling v. Rockefeller*, 277 N.Y.S.2d 168, 52 Misc. 2d 745 (1967). Contrary to the distinction drawn by plaintiff, the discharge or reassignment premised upon misconduct on the part of the enlisted man, such as in the *Baum* case, provides the basis for a potentially stronger appeal to the civil courts.[3]

Historically, the relationship between a sovereign and the enlisted man serving in a militia, when couched in terms of either an implied or express contract for the purposes of judicial perspective, is unlike that of his civilian counterpart, notwithstanding statutory provisions. Accordingly, though set forth in a federal posture, it has been articulated in *Reid v. United States*, 161 F. 469, 472 (S.D.N.Y. 1908).

> "The exact method of this soldier's discharge and the quantum or kind of character that should be given him, not

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[3] In a similar vein, the courts have been restricted to a narrow scope of review in examining disciplinary actions of unit commanders resulting in assignment to active duty in the armed forces. See generally, Gianatasio v. Whyte, 426 F.2d 908 (2nd Cir. 1970); Jolicoeur v. Laird, 344 F.Supp. 1125 (D.C.Minn.), aff'd 462 F.2d 1234 (8th Cir. 1971); Comunale v. Mier, 355 F.Supp. 429 (D.C. Pa. 1973).

being regulated by statute, must necessarily be left in the discretion of the executive officer having power to grant some type of discharge. That it is beyond the power of the judicial branch to coerce or review the discretion of the executive is familiar doctrine."[4]

Again, it is of significance to note that *Reid* addresses itself to the nature of the executive's discretion in discharging the enlisted man prior to the end of reenlistment.

More recently, the Supreme Court tempered the role of the federal court in reviewing administrative proceedings in the United States Army:

> "We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the army. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to interevene in judicial matters. . . ."
>
> *Orloff v. Willoughby*, 345 U.S. 83, 93 (1953).

As noted above, this principle has found similar application in judicial review of state militia proceedings, since its policy basis is equally controlling on the state level.[5]

Finally, this Court has examined the Supreme Court's rulings in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972), for possible application.

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[4] The roots of this doctrine are deep and find their basis in the relation of the British crown to its soldiers. In re Tuffnell, L.R. 3 Ch.Div. 173; see also United States v. Cottingham, 1 Rob. (Va.) 629; United States v. Blakeney, 3 Grat. (Va.) 405; In re Morrissey, 137 U.S. 157, 11 S.Ct. 57, 34 L.Ed. 644 (1890).

[5] See note 3, *supra*.

Any application of those cases is negated by the unique relationship between the state militia and the enlisted man[6] and the fact that generally *Roth* and *Sindermann* have been restricted in application to the university community.

In conclusion, it is the considered opinion of the Court that it is without the power to review the denial of plaintiff's request for reenlistment in the Tennessee Air National Guard, in the absence of extraordinary circumstances.

Accordingly, it is Ordered that defendant's motion be, and the same hereby is, granted.

/s/ Robert Taylor
United States District Judge

---

[6] See e.g., *Washington State Nat. Guard v. Washington State Personnel Bd.*, 379 P.2d 1002, 61 Wash.2d 708 (1963).

APPENDIX C

In the United States District Court, Eastern District of Tennessee, Northern Division

Billy Don Dunlap
Plaintiff
v.
Colonel Robert W. Akin, et al.
Defendants
Civil Action No. 3-74-15

MOTION TO DISMISS AND ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

Come now the defendants by and through the Attorney General and the State of Tennessee and move this Honorable Court to dismiss this complaint under the provisions of the Federal Rules of Civil Procedure, Rule 12(b)(6) and (7) for failure to state a claim upon which relief can be granted and for failure to join a party in whose absence complete relief cannot be accorded, pursuant to the provisions of Rule 19; or in the alternative to enter summary judgment for the defendants pursuant to Rule 56(b).

Respectfully submitted

/s/ ALEX B. SHIPLEY, JR.
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In the United States District Court, Eastern District of Tennessee, Northern Division

Billy Don Dunlap
Plaintiff
v.
Colonel Robert W. Akin, et al.
Defendants
Civil Action No. 3-74-15

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

The plaintiff, Billy Don Dunlap, has brought this civil action complaining of termination of employment as a technician with the Tennessee Air National Guard. He has alleged that this termination of employment occurred as a result of the refusal of the defendants to allow him to re-enlist in the Tennessee Air National Guard.

I

The plaintiff has asserted that the refusal of certain officers of the Tennessee Air National Guard to allow his re-enlistment resulted in his discharge from his civil service employment as a technician. His employment was not unlike that involved in the case of *Baum v. Zuckert*, 342 F. 2d 145 (6th Cir. 1955), concerning the Air Force Reserve technician program, in which the Court stated that the program was to provide active Air Force Reserve units

> ". . . which are composed chiefly of personnel who train only a few days each month and two weeks in the summer, with a core of highly trained personnel whose full time

civilian jobs coincide with their military job. This is the reason for the requirement that plaintiff was to maintain his status as an active member of the local Air Force Reserve Training Unit, and that if he failed to do so 'for reasons within his control' he would be considered to have failed to have met a condition of employment, thereby requiring separation from his civilian position." (at page 146).

In that case the plaintiff had previously resorted to his remedies available to him pursuant to his position as a civl service employee. In the case at bar the plaintiff has not alleged that he has exhausted any of the administrative remedies available to him.

Furthermore, in *Baum v. Zuckert*, the Court of Appeals noted that the judicial function was to determine whether there had been substantial compliance with the law and regulations rather than to review the wisdom or good judgment of those exercising discretion under the law and regulations.

II

The plaintiff seeks reinstatement of his employment as a technician with the Tennessee Air National Guard. Under the provisions of 32 U.S.C. §709, the plaintiff was required to be a member of the Tennessee Air National Guard while employed as a technician. Under 32 U.S.C. §709(e)(1) the plaintiff was required to be promptly separated from his technician employment by the Adjutant General of the State of Tennessee when he was separated from the Tennessee Air National Guard.

The actions of the defendant officers of the Tennessee Air National Guard were taken pursuant to regulations prescribed by the Secretary of the Air Force, 32 U.S.C. §709. Thus, his challenge to the regulations under which he was not allowed to re-enlist and regulations under which his employment as a technician was terminated would require the joinder of the Secretary of the Air Force who is empowered by law to prescribe such regulations.

III

In support of the Motion for Summary Judgment, the defendants would show the Court that the complaint arises out of alleged actions of the defendants in improperly refusing to allow the plaintiff to reenlist in the Tennessee Air National Guard. The termination of the plaintiff's employment as a technician came by operation of law; thus the only matter litigable involves the refusal of the defendants to allow the plaintiff to reenlist. According to the complaint, the action occurred prior to 8 December 1972 and the plaintiff was discharged from the Tennessee Air National Guard on 8 December 1972. The complaint was brought 11 January 1974. Under the provisions of T.C.A. §28-304 civil actions for compensatory or punitive damages or both brought under the federal Civil Rights statutes shall be commenced within one year after the cause of action accrued. Thus, the present action is barred by the applicable statute of limitations.

CONCLUSION

Therefore, the defendants would assert that the issue at bar is a military matter concerning the merits of the defendants' refusal to allow the plaintiff to re-enlist which should not be examined by this Court; that the relief sought cannot be accorded without joinder of the Secretary of the Air Force who has prescribed the regulations under which the defendants acted; and that the cause of action arose by plaintiff's discharge from service in the Tennessee Air National Guard on 8 December 1972 and is thus barred by the applicable statute of limitations.

The defendants would urge this Honorable Court to dismiss the complaint under the provisions of F.R.C.P., Rule 12(b)(6) or (7), or both; and in the alternative to grant summary judgment in their favor pursuant to F.R.C.P., Rule 56(b).

Respectfully submitted

/s/ ALEX B. SHIPLEY, JR.
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Telephone: (615) 741-2865
Attorney for Defendants

APPENDIX D

In the United States District Court for the
Eastern District of Tennessee

Civil Action No. Civ-3-74-15

Billy Don Dunlap

Plaintiff

vs.

State of Tennessee: Winfield Dunn, as Governor of the State of Tennessee and Commander-in-Chief of the National Guard of the State of Tennessee; Tennessee Air National Guard; Tennessee Air National Guard, 134th Air Refueling Group (TAC); Major General William C. Smith, as Adjutant General of the National Guard of the State of Tennessee; Colonel Robert W. Akin, as Commander of the 134th Air Refueling Group; Lieutenant Colonel David L. Carter, as Commander of the 134th Combat Support Squadron; Lieutenant Colonel Bob Arr, as Commander of the 151st Air Refueling Squadron; Lieutenant Colonel William D. Asbury, as Commander of the 134th Supply Squadron; Lieutenant Colonel Thomas P. Webb III, as Commander of the 134th Camron Squadron; and Lieutenant Colonel Marshall C. Pierce, as 134th Director of Operations

Defendants

COMPLAINT

Comes now the plaintiff, Billy Don Dunlap, and would respectfully show unto this Honorable Court that:

1. This is an action brought to redress the deprivation, under color of state statutes, ordinances, regulations, customs or usages of and pertaining to the Air National Guard of the State of Tennessee, of certain rights, privileges and immunities secured to the plaintiff by the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and Title 42, United States Code, Sections 1983, 1985(3) and 1986. This suit also seeks a judgment declaring the discretion or prerogative allegedly vested in a commander to reenlist or not reenlist a member in the Air National Guard and to decide what is in the best interest of the Air National Guard, as it was used against the plaintiff in the instant case, to be unconstitutional and for an injunction prohibiting the deprivation of the plaintiff's rights, privileges and immunities, by the defendants, through the use of said alleged discretion or prerogative vested in his commander. Jurisdiction of this Court is invoked pursuant to the provisions of Title 28 of the United States Code.

2. The matter in controversy exceeds in monetary value the sum of $10,000.00, exclusive of interest and costs.

3. The plaintiff is a citizen and resident of the State of Tennessee, and was employed by the Tennessee Air National Guard, 134th Air Refueling Group, as an Air Guard technician, Job No. 81-13, from the 13th day of August, 1967, through the 12th day of January, 1973.

4. The defendants are the State of Tennessee; Winfield Dunn, Governor of the State of Tennessee and Commander-in-Chief of the National Guard of the State of Tennessee; the Tennessee Air National Guard; the Tennessee Air National Guard, 134th Air Refueling Group; Major General William C. Smith, Adjutant General of the National Guard of the State of Tennessee; Colonel Robert W. Akin, Commander of the 134th Air Refueling Group of the Tennessee Air National Guard; Lieutenant Colonel David L. Carter, Commander of the 134th Combat Support Squadron; Lieutenant Colonel Bob Arr, Commander of the 151st Air Refueling Squadron; Lieutenant Colonel William D. Asbury, Commander of the 134th Supply Squadron; Lieutenant Colonel Thomas P. Webb III, Commander of the 134th Camron Squadron; and Lieutenant Colonel Marshall C. Pierce, 134th Director of Operations.

5. The Tennessee Air National Guard exists pursuant to the laws of the State of Tennessee, as a governmental agency of the State of Tennessee.

6. The individual defendants are now and were at all times material hereto duly elected, qualified, acting, appointed or employed members of the Tennessee Air National Guard of the State of Tennessee and as such have and had under their control all or part of the general operation and supervision of said Air National Guard. Said defendants have and had the further power and authority to enforce and make use of the rules and regulations prescribed for the operation and conduct of said Air National Guard. The individual defendants are agents, servants and employees of the State of Tennessee in the enforcement of all said rules and regulations.

7. The action of which the plaintiff now complains was the termination of his employment, on the 12th day of January, 1973, as a technician with the Tennessee Air National Guard, which action, although taken by some of the individual defendants under "color of law," constituted a violation of the plaintiff's rights, privileges and immunities as granted under the Fourteenth Amendment of the Constitution of the United States and Title 42, United States Code, Sections 1983, 1985 (3) and 1986.

8. The rules and regulations require that as a condition of employment as a technician by the Tennessee Air National Guard, that the technician is required to be a federally recognized member of the Tennessee Air National Guard.

9. The plaintiff was a federally recognized member of the Tennessee Air National Guard from the date of his initial employment by it as a technician until the 8th day of December, 1972, on which date his last term of enlistment expired.

10. Prior to December 8, 1972, the plaintiff attempted to effectuate his reenlistment in the Tennessee Air National Guard by contacting the appropriate officials. However, the plaintiff was informed that his commander, the defendant, Robert W. Akin in the exercise of his alleged discretion or prerogative, had decided that it was not in the best interest of the Tennessee Air National Guard to allow him to reenlist. Thereafter, the plaintiff continued in his efforts to reenlist and was informed that the defendant, Robert W. Akin, had decided to convene a board comprised of the defendants, David L. Carter, Bob Arr, William D. Asbury, Thomas P. Webb III and Marshall C. Pierce, to advise him as to whether or not the plaintiff should be allowed to reenlist. The plaintiff requested that he be allowed to appear before said board, for the purpose of attempting to receive a fair and impartial hearing, but his request was denied. The board recommended that it was not in the best interest of the Tennessee Air National Guard to allow the plaintiff to reenlist. The plaintiff requested, but was never furnished, the reason why it was considered not to be in the best interest of the Tennessee Air National Guard to allow him to reenlist. The plaintiff was never supplied a copy of any charges or statements made against him when the board was convened, although he requested the same.

11. On December 8, 1972, an order was issued discharging the plaintiff from the Tennessee Air National Guard and as a Reserve of the Air Force. The reason stated, in the order, for the plaintiff's discharge was the expiration of his term of service.

12. On December 13, 1972, the plaintiff received a letter from the defendant, Robert W. Akin, notifying him that his employment as a technician would be terminated, effective 30

days from the date of receipt of said letter, due to his loss of military membership in the Tennessee Air National Guard.

13. The discretion or prerogative allegedly vested in the commander-defendant, Robert W. Akin, to decide whether or not it is in the best interest of the Air National Guard to allow a member to reenlist, as it was used in this case, constitutes a denial of the plaintiff's right to due process of law inasmuch as it is vague and lacks any objective or ascertainable standards or criteria to guide the commander in his decision as to what is in the best interest of the Air National Guard and by which a commander's decision may be gauged.

14. The action taken by the defendant, Robert W. Akin, under color of authority, was purposeful and intentional action that was calculated to culminate in the plaintiff's discharge from his technician's job and have the further result of placing the plaintiff in such a position as would either frustrate or deny any opportunity for him to effectively pursue an administrative remedy.

15. The action taken by the defendant, Robert W. Akin, was arbitrary, capricious, unreasonable, amounted to an abuse or misuse of his allegedly vested discretion or prerogative, was discriminatory in nature and thereby resulted in a deprivation of certain rights, privileges and immunities secured to the plaintiff by the Fourteenth Amendment to the Constitution of the United States and Title 42, United States Code, Sections 1983, 1985(3) and 1986.

16. The action taken by the board and the members thereof was a continuing and further effort to eliminate the plaintiff from his position as a technician and to frustrate or deny any opportunity for him to effectively pursue an administrative remedy. The action taken was arbitrary, capricious, unreasonable and discriminatory in nature and thereby deprived the plaintiff of certain rights, privileges and immunities secured to him

by the Fourteenth Amendment of the Constitution of the United States and Title 42, United States Code, Sections 1983, 1985(3) and 1986.

Wherefore, plaintiff demands a jury to try the issues when joined and demands judgment as follows:

(1) That this Honorable Court assume jurisdiction in this matter.

(2) That proper process issue and be served upon each of the said defendants, herein named, requiring them to appear and answer this complaint.

(3) That the plaintiff be reinstated in his former employment position, as a technician, or the equivalent thereof, with the Tennessee Air National Guard, 134th Air Refueling Group.

(4) That the plaintiff be reinstated and allowed to reenlist as a federally recognized member of the Tennessee Air National Guard, in his former position therein or the equivalent thereof, with the Tennessee Air National Guard, 134th Air Refueling Group.

(5) For a sum of money equal to plaintiff's full back pay, including regular periodic increases allotted to his position, as a technician, from the date of termination of employment to the date when he is reinstated, minus his interim earnings.

(6) For a judgment declaring the discretion or prerogative allegedly vested in a commander, to decide whether or not it is in the best interest of the Air National Guard to allow a member to reenlist, to be so vague and lacking in objective or ascertainable standards or criteria to guide or gauge the commander's decision as to be unconstitutional and thereby to have constituted a deprivation of the plaintiff's right to due process.

(7) For an injunction enjoining the defendants, their agents, employees, servants and all others acting in concert therewith from pursuing any action against the plaintiff which would be discriminatory in nature or constitute a deprivation of his rights, privileges or immunities.

(8) For costs and such other, further and general relief as the Court shall deem proper.

17. Plaintiff now and hereby incorporates herein all of the allegations set forth in Paragraphs 1 through 16 above.

18. The acts of the defendants, Robert W. Akin, David L. Carter, Bob Arr, William D. Asbury, Thomas P. Webb III and Marshall C. Pierce, set forth in Paragraphs 7, 10, 12, 14, 15, and 16 above, were done willfully with the intent and purpose of depriving the plaintiff of his rights, privileges and immunities secured to him by the Fourteenth Amendment to the Constitution of the United States and Title 42, United States Code, Sections 1983, 1985(3) and 1986 and further depriving him of his employment as a technician.

Wherefore, plaintiff demands a jury to try the issues when joined and demands judgment as follows:

(1) That this Honorable Court assume jurisdiction in this matter.

(2) That proper process issue and be served upon each of the said defendants, herein named, requiring them to appear and answer this complaint.

(3) For Judgment for damages in an amount deemed just and proper but in no event to exceed an aggregate amount of One Hundred Thousand ($100,000.00) Dollars, against each, any or all of the defendants.

(4) For costs and such other, further and general relief as the Court shall deem proper.

/s/ BILLY D. DUNLAP

/s/ WILLIAM TERRY DENTON
Attorney for the Plaintiff
P. O. Box 505
Maryville, Tennessee 37801

Certificate

I, William Terry Denton, Attorney for the Plaintiff, hereby certify the foregoing to be a true and exact copy of the original complaint filed in this cause on this the 11th day of January, 1974.

/s/ WILLIAM TERRY DENTON

Supreme Court, U. S.
FILED
AUG 16 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-95

STATE OF TENNESSEE; WINFIELD DUNN, as Governor of the State of Tennessee and Commander-in-Chief of the National Guard of the State of Tennessee; TENNESSEE AIR NATIONAL GUARD; TENNESSEE AIR NATIONAL GUARD, 134th Air Refueling Group (TAC); MAJOR GENERAL WILLIAM C. SMITH, as Adjutant General of the National Guard of the State of Tennessee; COLONEL ROBERT W. AKIN, as Commander of the 134th Air Refueling Group; LIEUTENANT COLONEL DAVID L. CARTER, as Commander of the 134th Combat Support Squadron; LIEUTENANT COLONEL BOB ARR, as Commander of the 151st Air Refueling Squadron; LIEUTENANT COLONEL WILLIAM D. ASBURY, as Commander of the 134th Supply Squadron; LIEUTENANT COLONEL THOMAS P. WEBB, III, as Commander of the 134th Camron Squadron; and LIEUTENANT COLONEL MARSHALL C. PEIRCE, as 134th Director of Operations,
Petitioners,

v.

BILLY DON DUNLAP,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-95

STATE OF TENNESSEE; WINFIELD DUNN, as Governor of the State of Tennessee and Commander-in-Chief of the National Guard of the State of Tennessee; TENNESSEE AIR NATIONAL GUARD; TENNESSEE AIR NATIONAL GUARD, 134th Air Refueling Group (TAC); MAJOR GENERAL WILLIAM C. SMITH, as Adjutant General of the National Guard of the State of Tennessee; COLONEL ROBERT W. AKIN, as Commander of the 134th Air Refueling Group; LIEUTENANT COLONEL DAVID L. CARTER, as Commander of the 134th Combat Support Squadron; LIEUTENANT COLONEL BOB ARR, as Commander of the 151st Air Refueling Squadron; LIEUTENANT COLONEL WILLIAM D. ASBURY, as Commander of the 134th Supply Squadron; LIEUTENANT COLONEL THOMAS P. WEBB, III, as Commander of the 134th Camron Squadron; and LIEUTENANT COLONEL MARSHALL C. PEIRCE, as 134th Director of Operations,
Petitioners,

v.

BILLY DON DUNLAP,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent respectfully prays that a Writ of Certiorari be denied to review the judgment of the United States Court of Appeals for the Sixth Circuit in the instant case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit and memorandum opinion of the United States District Court for the Eastern District of Tennessee are appended to the Petition for a Writ of Certiorari. The opinion of the Court of Appeals was entered on April 17, 1975.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTION PRESENTED

Respondent is of the opinion that the Petitioners' brief misstates the issue sought to be reviewed. The issue presented for determination is whether or not a federal court may review a military commander's decision to deny a request for re-enlistment when the complaint, filed in the cause, sets forth allegations that the decision was made for other than military reasons and did not involve an application of military expertise.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent agrees with the constitutional and statutory provisions involved as set forth in the Petitioners' brief, however, the Respondent would add the following statutory provision for consideration.

32 U.S.C.A. §709(e)(3) (Supp. 1974) provides:

> (3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned.

STATEMENT OF THE CASE

Petitioners' statement of the case is inaccurate insofar as it pertains to the relief sought by the Respondent, Billy Don Dunlap, in his complaint filed in the Federal District Court. The complaint sought a judgment declaring the discretion or prerogative allegedly vested in a commander, to decide whether or not it is in the best interest of the Air National Guard to allow a member to re-enlist, as it was used against the Respondent in the instant case, to be so vague and lacking in ascertainable standards or criteria to guide or guage the commander's decision as to be unconstitutional and thereby to have constituted a deprivation of the Respondent's right to due process. The complaint further sought to enjoin the Petitioners from pursuing any action against the Respondent which would be discriminatory in nature or constitute a deprivation of his rights, privileges or immunities.

Respondent respectfully makes the following additions to the Petitioners' statement of the case. The Respondent was originally informed that his commander, in the exercise of his discretion or prerogative, had decided that it was not in the best interest of the Tennessee Air National Guard to allow his re-enlistment. Thereafter, Respondent continued in his efforts to effect his re-enlistment. Respondent's commander convened a board of officers to consider whether or not the

Respondent should be allowed to re-enlist. Although the Respondent requested to be allowed to appear before the board, for the purpose of receiving a fair and impartial hearing, and further requested that he be supplied a copy of any charges or statements made against him, both requests were denied by the Petitioners.

Respondent's complaint alleged that the action taken by his commander and the board of officers was purposeful and intentional action that was calculated to result in effecting the Respondent's discharge from his technician's job with the Tennessee Air National Guard and would place the Respondent in such a position as would frustrate or deny any opportunity for him to effectively pursue an administrative remedy. The complaint further alleged that the Respondent's commander's action was arbitrary, capricious, unreasonable and amounted to an abuse or misuse of his allegedly vested discretion or prerogative and that the commander's and board of officers' action was discriminatory in nature and thereby resulted in a deprivation of certain of the Respondent's rights, privileges and immunities. As a result of the action taken by the Respondent's commander and the board of officers, which action culminated in the Respondent's loss of his membership in the Tennessee Air National Guard and his technician's employment therewith, the Respondent filed this action on January 11, 1974. The Petitioners responded by filing a motion to dismiss and alternate motion for summary judgment to which the Respondent filed a response. (Appendix A)

The Respondent accepts the remainder of the Petitioners' statement of the case as being substantially correct.

REASON FOR DENYING THE WRIT

The decision of the Court of Appeals was based on a sound judicial appraisal of the record and all relevant facts involved in this cause. Contrary to the Petitioners' position, the Court of Appeal's opinion was not a departure from the accepted and usual standard of review of military decisions but was in strict conformity therewith and was reiterative of the same. Therefore, if the decision of the Sixth Circuit is allowed to stand, it would not result in an increased potential of review of military decisions.

ARGUMENT

The Respondent is cognizant that there has been a historical reluctance on the part of the courts to review the actions and decisions of the military. However, this reluctance to review has been primarily directed toward military matters requiring military expertise wherein there have been established safeguards for the protection of the individual's constitutional rights, especially the right to procedual due process.

The Court of Appeals, in its decision in the instant case, correctly and aptly noted that the threshold question, for a court in deciding whether the doctrine on nonreviewability of military decisions is applicable in a particular case, must of necessity be directed primarily toward the nature of the decision which a party seeks reviewed and not the mere identity of the decision-maker. The Court further noted that decisions may be outside the boundaries of the doctrine of nonreviewability when they are made for non-military reasons involving no military expertise.

The complaint filed by the Respondent in the Federal District Court contained allegations that the decision, made by the Respondent's commander, not to allow the Respondent to re-enlist, was made for non-military reasons. It is obvious that taking the Respondent's allegations and construing them most favorably to him at this point in the proceedings that they raise a genuine issue as to his interest in continued employment with the Tennessee Air National Guard. *Perry v. Sindermann,* 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

Inasmuch as our judicial system has provided a remedy for every wrong, this should find no less application to wrongs committed against one who holds a military position, by his superior officers, than wrongs committed against a person holding a purely civilian type of employment.

One who is a member of a military unit, whether it be a regular, reserve, national guard or militia type of unit, does not as a result of this particular type of employment, lose or relinquish his constitutional rights, especially his right to procedural due process. In *Calhoun v. Doster,* 324 F. Supp. 736 (M.D. Ala. 1971), it was held that when a person assumed public employment that they retained all the rights and privileges that they had otherwise been accorded by the United States Constitution.

In *Harmon v. Brucker,* 355 U.S. 579, 78 S. Ct. 433, 2 L. Ed. 2d 503 (1958), it was held that military matters could be reviewed so that a determination could be made as to whether or not the decision made by military authorities was within the scope of statutory and regulatory authority. The Respondent's complaint clearly raised an issue as to whether or not his

commander and the board of officers had acted outside the scope of their statutory and regulatory authority. This issue was presented through the Respondent's allegations that he was refused the right to appear before the board, in order to obtain a fair and impartial hearing and that he was refused a copy of the charges or statements made against before the board and the refusal to inform the Respondent of the reason it was considered not to be in the best interest of the Tennessee Air National Guard to allow his re-enlistment.

Once the Respondent's commander convened the board of officers to hear charges or statements against the Respondent, he became clothed with the right to appear and/or be represented before the board in order to receive a fair and impartial hearing and the right to receive or be informed of the charges or statements to be made against him. These actions were outside the commander's scope of statutory and regulatory authority and constituted arbitrary and unreasonable actions which infringed on and denied the Respondent his constitutional right of procedual due process. Further, the Respondent alleges that his commander's determination, not to allow his re-enlistment, was a mere sham to effect his removal from his technician's employment and frustrate or deny any opportunity for him to effectively pursue an administrative remedy because of the loss of such employment. Therefore, in accordance with *Harmon v. Bucker, supra,* the Respondent's commander's decision is clearly reviewable.

Although the Respondent was a member of the Tennessee Air National Guard and employed as a technician therewith, he retained all rights, privileges and immunities granted and guaranteed to individuals by the United States Constitution and the laws of the

United States, including the right not to be subjected to the arbitrary, unreasonable and unconstitutional actions of his commander and the board of officers and the right to due process and equal protection. The Honorable Justice Douglas in his opinion in *Winters v. United States,* 89 S. Ct. 57, 21 L. Ed. 2d. 80 (1968), held that members of the military are entitled to equal justice under the law as set forth in the Constitution and our Public Laws and not as conceived by the generosity of their commander.

The Respondent further contends that the decision made by his commander is subject to judicial review inasmuch as the Respondent's complaint alleged that the discretion or prerogative allegedly vested in his commander to decide whether or not to allow a member to re-enlist, as it was used against the Respondent to deny his re-enlistment, is so vague and lacking in objective or ascertainable standards or criteria to guide or guage the commander's decision as to be unconstitutional, and therefore constituted arbitrary and unreasonable action which infringed on and denied the Respondent his constitutional rights of due process and equal protection. Also, the Respondent has been unable to discover any statute or regulation which vests his commander with this alleged discretion or prerogative and the Petitioners have totally failed to allege that such a statute or regulation exists and therefore the Respondent entertains serious doubt as to the existence of the same. However, even if this alleged discretion or prerogative exists the Respondent does not contend that this Honorable Court should or could substitute its thinking for that of the commander's, but would assert that there was an abuse, of this alleged discretion or prerogative, which amounted to a denial of the Respondent's rights and that Federal Courts are

empowered with the necessary authority to grant the Respondent relief from this abuse. In *Sterling v. Constantin,* 287 U.S. 378, 53 S. Ct. 190, 77 L.Ed. 375 (1932), it was decided that the allowable limits on military discretion and whether they have been overstepped, in a particular instance, are judicial questions. Furthermore, in *Schatten v. United States,* 419 F. 2d. 187 (6th Cir. 1969) it was held that while it is not for the judiciary to direct the exercise of discretion in a particular way that it is appropriate for the judiciary to require that authorities temper the exercise of their discretion with their own regulations and the laws of the United States. As the Petitioners noted in their brief, the Courts have not been reluctant to grant review where military officials have violated military regulations and where there have been claims of unconstitutionality of statutes, executive orders and regulations. It is clear that the Respondent's allegations have met the criteria heretofore established for the judicial review of military decisions.

As the Petitioners have noted in their brief, the United States Court of Appeals for the Fifth Circuit in the case of *Mindes v. Seaman,* 453 F. 2d 197 (5th Cir. 1971) at page 201, set forth certain factors which should guide a court in deciding whether or not to review military matters. The Fifth Circuit held that as a primary consideration there should be no judicial review of internal military affairs in the absence of an allegation of the deprivation of a constitutional right or a claim that the military violated or failed to follow its own regulations or the applicable statutes. However, the Fifth Circuit went further and stated that a district court, which has been presented with sufficient allegations to meet the primary considerations for review, must examine the substance of the allegations, using certain

factors, in order to make a determination as to whether or not review of the military matters are justified in the particular case. The factors which were indicated were: (1) the nature and strength of the plaintiff's challenge to the military determination, with constitutional claims normally being more important than those having only a statutory or regulatory base, (2) the potential injury that the plaintiff could suffer if review is denied, (3) the type and degree of anticipated interference with the military function if review is granted, however, interference per se is insufficient since there will always be some interference when review is granted, and, (4) the extent to which the exercise of military expertise or discretion is involved.

An application of the factors set forth in *Mindes v. Seaman, supra,* to the allegations in the Respondent's complaint, filed in the District Court, justifiably indicates that there should have been a review of the commander's and the board of officers' actions. The Respondent's complaint alleged both a deprivation of his constitutional rights and a violation, by his commander, of applicable statutes or regulations. The alleged deprivation of the Respondent's constitutional rights were the result of his commander's refusal to allow him to appear and/or be represented before the board of officers for the purpose of receiving a fair and impartial hearing, his commander's refusal to furnish him with a copy of the charges or statements to be made against him before the board and further that the alleged prerogative or discretion vested in the Respondent's commander was unconstitutional inasmuch as it was not particulary delineated. The Respondent alleged that there was a violation of the applicable statutes or regulations, by his commander, inasmuch as the commander's actions were arbitrary, capricious,

unreasonable and an abuse or misuse of his allegedly vested discretion or prerogative and were purposeful and intentional actions that were calculated to result in the Respondent's discharge from his technician's employment. Respondent insists that these allegations are not tenuous of frivolous, but are of such a substantial nature as to demand review.

The Respondent asserts that, as a result of the Petitioners' actions, he has been caused to suffer substantial injury. The Respondent had, until his date of discharge, accrued approximately 17-½ years of creditable time toward the 20 years required for his military retirement benefits. He had a reasonable expectation that he would be allowed to re-enlist and thereby complete the remaining 2-½ years required for him to be entitled to his retirement benefits. The actions of the Petitioners not only deprived the Respondent of these retirement benefits, but it had the result of causing him to lose his technician position with the Air Guard. Additionally, the Respondent's age now presents a hardship in his efforts to provide for his future. Therefore, the potential injury to the Respondent, if review is denied, is of a real and substantial nature.

A review of the commander's action, in this case, would not seriously impede the Air Guard in the performance of its mission and to require the Petitioners to grant the Respondent his constitutional rights to due process and equal protection would result in very little, if any, interference with the military function of the Tennessee Air National Guard. The Petitioners are misguided in the conviction that if the Sixth Circuit's decision, in the instant case, is allowed to stand that it presents the potentiality for tremendous abuse and

would thereby cause much interference with the military function. The Sixth Circuit's decision was in conformity with previous established criteria for judicial review of military matters.

The Respondent does not contend that the judiciary should substitute its judgment for that of his commander, but merely contends that the court should require that the alleged discretion or prerogative be tempered to such an extent so as to not be unreasonable and arbitrary and thereby amount to a denial of the Respondent's constitutional rights. Further, the Respondent's position is that there is no military expertise or discretion involved when, as the Respondent alleged and the Sixth Circuit aptly noted, a decision was made for other than military reasons.

CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that the Petition for a Writ of Certiorari, prayed for by the Petitioners, should be denied.

Respectfully submitted

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APPENDIX

APPENDIX A

In the United States District Court
For the Eastern District of Tennessee

Billy Don Dunlap
Plaintiff
v.
Colonel Robert W. Akin, et al.
Defendants

Civil Action
No. 3-74-15

PLAINTIFF'S REPLY TO THE DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND ALTERNATIVE MOTION FOR SUMMARY JUDGMENT

The plaintiff, Billy Don Dunlap, has brought this Civil Rights action to redress the deprivation, under color of statute, ordinances, regulations, customs or usages of and pertaining to the Air National Guard of the State of Tennessee, of certain rights, privileges and immunities secured to the plaintiff. The plaintiff complains of the defendants' actions in refusing to allow him to re-enlist in the Tennessee Air National Guard, which action resulted in the termination of his employment as a technician with the Tennessee Air National Guard.

I

The plaintiff did assert that the refusal, of certain officers of the Tennessee Air National Guard, to allow his re-enlistment resulted in his discharge from his civil service employment as a technician.

The plaintiff agrees with the defendants' contention that his employment was not unlike that involved in the case of *Baum v. Zuckert,* 342 F. 2d 145 (6th Cir. 1955) and further agrees that the requirements, that a civilian technician maintain his status as an active member of the local Air Force Training Unit, is both reasonable and legitimate. However, inasmuch as the factual situation in *Baum v. Zuckert* differs greatly from that in the instant case, the plaintiff cannot concede that the *Baum v. Zuckert* case is in any manner either of a controlling nature or pertinent in the present case.

The plaintiff in *Baum v. Zuckert* was given a direct order which he, in a 'belligerent and hostile manner,' refused to obey. Because of his refusal to obey the order, the plaintiff was reassigned to the inactive reserve which resulted in the loss of his civilian technician employment. The Court felt that the plaintiff lost his active membership in the reserve unit 'for reasons within his control' inasmuch as it was within his control to obey the direct order instead of being insubordinate in refusing to obey the same.

In the case at bar, the plaintiff was not allowed to re-enlist at the expiration of his term of service. The plaintiff was not guilty of insubordination and had met all requirements and conditions requisite to re-enlistment. Moreover, the defendants never charged that the plaintiff had failed to meet any conditions for re-enlistment. The plaintiff made numerous requests that the defendants furnish him the reason(s) for their decision not to allow his re-enlistment but he was never informed of the same.

Therefore, it cannot be maintained that the plaintiff failed to meet any of the conditions of re-enlistment 'for reasons within his control.'

While it is true that the plaintiff in *Baum v. Zuckert* had previously resorted to the remedies available to him pursuant to his position as a civilian technician, it is likewise a fact, in the present case, that the plaintiff had pursued the administrative remedy available to him. On or about the 22nd day of January, 1973, the plaintiff filed an appeal, of his termination and refusal of re-enlistment, as provided for under 32 U.S.C. §709(3), with the Adjutant General of the National Guard of the State of Tennessee.

Even if the plaintiff had failed to pursue or exhaust his administrative remedies, it would not constitute a valid basis for dismissal of this action. In the case of *Calhoun v. Doster,* 324 F. Supp. 736, the plaintiff, an active member of a Air National Guard unit and a civilian technician therewith, filed an action for deprivation of rights under 42 U.S.C. §§1983 and 1985. The defendants filed a motion to dismiss alleging as one ground therein that the plaintiff had failed to exhaust his administrative remedies. The Court held:

> "Defendants also contend that plaintiff has failed to exhaust his administrative remedies as set forth in 32 U.S.C. §709(e) and its implementing regulations. Such contention is without merit. A number of Supreme Court decisions have clearly held that a plaintiff bringing a §1983 action need not exhaust his state administrative remedies before seeking redress in the federal courts. (citing cases)
>
> *Calhoun v. Doster,*
> *324 F. Supp. 736, pg. 740*

Therefore, it would not appear that the case at bar has been prematurely initiated by the plaintiff, but is presently both an appropriate and cognizable action for this Court.

II

The defendants' contention that this action requires the joinder of the Secretary of the Air Force, who is empowered by law to promulgate regulations, is ill-founded.

Contrary to the defendants' contention, the plaintiff does not challenge the provisions of 32 U.S.C. §709. The plaintiff readily concedes that the provisions of 32 U.S.C. §709, requiring a person employed as a technician to be an active member of the Guard unit and requiring their separation from technician employment on loss of active Guard membership, are presumptively valid. Even if the plaintiff challenged the provisions of this statute it would not require the joinder of the Secretary of the Air Force.

What the plaintiff challenges is the *alleged* discretion or prerogative vested in the commander, of his unit, to arbitrarily decide whether or not to allow a member to re-enlist, inasmuch as this *alleged* authority is so vague and lacking in objective or ascertainable standards or criteria to guide or gauge the commander's decision. Furthermore, the plaintiff has been totally unable to discover any statute or regulation which vests such authority in the commander and therefore entertains serious doubt as to the existence of the same.

The Air National Guard Regulation 39-10, Paragraph 4, provides as follows:

> "4. *Separation Authority*. The authority to separate members from the Air National Guard rests with the State. The authority to separate members from their Reserve of the Air Force enlistments rests with

> the Secretary of the Air Force, and is delegated to the State adjutant general, as indicated in this regulation, with authority to the commanders of wings, separate groups, or separate squadrons."
>
> *ANG Regulation 39-10, Paragraph 4, Page 3.*

And the Air National Guard Regulation 39-09, Paragraph 1-3, provides:

> 1-3 *Policy:*
> "a. Recruiting and enlistment is the responsibility of the State."
>
> *ANG Regulation 39-09, Paragraph 1-3, Page 1-2:*

The provisions of T.C.A. §7-105, provide that the governor of the State is the commander-in-chief of the military forces, except when they are called into the service of the United States, and as such he is empowered to issue all orders, rules and regulations for the conduct of the Tennessee National Guard.

It is readily clear that the functioning of the Tennessee Air National Guard, including re-enlistments, is administered and controlled on the state level instead of the federal level. Also, as it was indicated in *Calhoun v. Doster* (supra), members of the Guard, in their military capacities, are 'state employees'.

This is further indicative of the fact that the present action does not require the joinder of the Secretary of the Air Force as a party.

The plaintiff further contends that the provisions of Rule 19 of the Federal Rules of Civil Procedure, neither

absolutely require the joinder of the Secretary of the Air Force in this action nor provide an unqualified right of dismissal for the plaintiff's failure to join the Secretary.

III

The defendants' contention, in support of their motion for summary judgment, that the plaintiff's action is barred, by the provisions of T.C.A. §28-304, is without merit.

It is true that the plaintiff complains of the actions of the defendants in improperly refusing to allow him to re-enlist in the Air Guard on December 8, 1972, however, the plaintiff's cause of action extends further inasmuch as the defendants' actions were calculated to culminate in the plaintiff's termination from his technician's job on January 12, 1973. At any time, during the period from the plaintiff's discharge from the Air Guard on December 8, 1972, and his termination as a technician on January 12, 1973, the defendants could have taken appropriate action to rectify the situation and prevent the loss of the plaintiff's technician employment. It was not until the plaintiff was terminated on January 12, 1973, that he had accrued a complete cause of action. Many cases have held that a plaintiff does not have to or cannot bring an action until a complete cause of action has accrued. Although the defendants contend that the plaintiff's termination as a technician came by operation of law, the plaintiff contends that this was the result desired by the defendants and inasmuch as their actions were taken in an effort to reach this desired result, they are bound by the result as if it were their own act.

Even if the defendants' contention, that the plaintiff's cause of action accrued on December 8, 1972, and he would be required to commence his Civil Rights action within one year, was taken as true, it would still not constitute a bar to the plantiff's present action since, as aforementioned, he filed an appeal, of his discharge from the Guard and termination as a technician, with the Adjutant General of the National Guard of the State of Tennessee, on or about the 22nd day of January, 1973, and he received notice from the Adjutant General sometime in April, 1973, that the relief sought in his appeal was denied. This appeal was an administrative remedy provided by 32 U.S.C. §709(e) and of which the plaintiff availed himself. It is well established that the filing of an administrative remedy or appeal operates to toll the running of the statute of limitations. To hold otherwise might result in a person losing their right to a judicial action because of the running of the statute of limitations while they attempted to exhaust their administrative remedies before seeking judicial relief.

Furthermore, the plaintiff would contend that the statute of limitations did not commence to run against his present action on December 8, 1972, inasmuch as the defendants have attempted to conceal material facts from the plaintiff and thereby prevent his discovery of their wrongs and the fact that a cause of action had accrued against them. It was in the latter part of the year 1973 before the plaintiff was able to discover that a possible legal cause of action accrued. The defendants have attempted to conceal the fact that their actions were neither reasonable, justifiable or authorized. The authorities and numerous cases have set forth the rule that the fraudulent concealment of a cause of action by those against whom it lies, from the one whom it belongs, will toll, postpone or suspend the running of the applicable statute of limitations.

CONCLUSION

Therefore, the plaintiff would respectfully insist that he has stated a complete cause of action that is appropriate for adjudication in this Court. That the Court can grant all the relief sought without the joinder of the Secretary of the Air Force and without any prejudice to any of the defendants. The plaintiff further respectfully insists that his action is not barred by any statute of limitations.

Wherefore, the plaintiff respectfully insists that this Honorable Court hold that the defendants' motion to dismiss the complaint and alternative motion for summary judgment are without merit and should therefore be overruled.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, William Terry Denton, attorney for the Plaintiff, hereby certify that a true and exact copy of the foregoing Reply to the Defendants' Motion to Dismiss and Alternative Motion for Summary Judgment has been mailed this 21st day of February, 1974, to the Honorable Alex B. Shipley, Jr., Assistant Attorney General, Attorney for Defendants, 420 Supreme Court Building, Nashville, Tennessee 37219.

William Terry Denton

APPENDIX B

CERTIFICATE OF SERVICE

I, William Terry Denton, attorney for the Respondent, hereby certify that true and exact copies of the foregoing Brief have been served on the Honorable Alex B. Shipley, Jr., Assistant Attorney General, Attorney for Petitioners, by depositing the same, with the correct postage, in the United States mail, addressed to him at his office at 420 Supreme Court Building, Nashville, Tennessee 37219.

WILLIAM TERRY DENTON

Supreme Court, U. S.
FILED
NOV 19 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-95

STATE OF TENNESSEE; WINFIELD DUNN, as Governor of the State of Tennessee and Commander-in-Chief of the National Guard of the State of Tennessee; TENNESSEE AIR NATIONAL GUARD; TENNESSEE AIR NATIONAL GUARD, 134th Air Refueling Group (TAC); MAJOR GENERAL WILLIAM C. SMITH, as Adjutant General of the National Guard of the State of Tennessee; COLONEL ROBERT W. AKIN, as Commander of the 134th Air Refueling Group; LIEUTENANT COLONEL DAVID L. CARTER, as Commander of the 134th Combat Support Squadron; LIEUTENANT COLONEL BOB ARR, as Commander of the 151st Air Refueling Squadron; LIEUTENANT COLONEL WILLIAM D. ASBURY, as Commander of the 134th Supply Squadron; LIEUTENANT COLONEL THOMAS P. WEBB, III, as Commander of the 134th Camron Squadron; and LIEUTENANT COLONEL MARSHALL C. PIERCE, as 134th Director of Operations,
Petitioners,

v.

BILLY DON DUNLAP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF PETITIONERS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 75-95

STATE OF TENNESSEE; WINFIELD DUNN, as Governor of the State of Tennessee and Commander-in-Chief of the National Guard of the State of Tennessee; TENNESSEE AIR NATIONAL GUARD; TENNESSEE AIR NATIONAL GUARD, 134th Air Refueling Group (TAC); MAJOR GENERAL WILLIAM C. SMITH, as Adjutant General of the National Guard of the State of Tennessee; COLONEL ROBERT W. AKIN, as Commander of the 134th Air Refueling Group; LIEUTENANT COLONEL DAVID L. CARTER, as Commander of the 134th Combat Support Squadron; LIEUTENANT COLONEL BOB ARR, as Commander of the 151st Air Refueling Squadron; LIEUTENANT COLONEL WILLIAM D. ASBURY, as Commander of the 134th Supply Squadron; LIEUTENANT COLONEL THOMAS P. WEBB, III, as Commander of the 134th Camron Squadron; and LIEUTENANT COLONEL MARSHALL C. PIERCE, as 134th Director of Operations,
Petitioners,

v.

BILLY DON DUNLAP,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

BRIEF OF PETITIONERS

OPINIONS BELOW

The Opinion of the Court of Appeals for the Sixth Circuit is reproduced as Appendix A to the Petition. (App. 1-6). It is reported at 514 F.2d 130 (1975). The Memorandum Opinion of the District Court for the Eastern District of Tennessee is reproduced as Appendix B to the Petition. (App. 7-13). It is reported at 376 F. Supp. 138 (1974).

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1975. The Petition for Certiorari was timely filed on July 16, 1975. The Petition was granted on October 6, 1975. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

QUESTION PRESENTED

The issues presented for determination are whether or not a federal court may review a military commander's decision to deny a request for re-enlistment, and whether a National Guard Technician has a protected interest in his military membership in the National Guard of a state.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions:

32 U.S.C. § 709(a) (Supp. 1974), provides:

> "Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in (1) the administration and training of the National Guard; and (2) the maintenance and repair of supplies issued to the National Guard of the armed forces.

32 U.S.C. § 709(b) (Supp. 1974) provides:

> Except as prescribed by the Secretary concerned, a technician employed under subsection (2) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

32 U.S.C. § 709(e)(1) (Supp. 1974) provides:

> Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned: (1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned.

32 U.S.C. § 709(e)(5) (Supp. 1974) provides:

> (5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned.

STATEMENT OF THE CASE

On January 11, 1974 the respondent, Billy Don Dunlap, filed a complaint against certain officers in the Tennessee Air National Guard, certain units of the Tennessee Air National Guard, the Governor of Tennessee and the State of Tennessee. (App. 19-26). The complaint asserted that it was founded upon the

due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States and upon 42 U.S.C. §§ 1983, 1985(3), and 1986. The complaint also sought a judgment to declare that a commander's prerogative in respect to re-enlistment of enlisted personnel in the Tennessee Air National Guard to be unconstitutional and also sought injunctive relief to prohibit the commander of the respondent from exercising that prerogative. Basically, the respondent sought to adjudicate the fact that his commander had determined that it was not in the best interests of the Tennessee Air National Guard to allow him to re-enlist at the termination of his current period of enlistment. (On December 8, 1972, the last day of his enlistment period, the respondent had been issued orders separating him from the Tennessee Air National Guard.) In addition to being a member of the Tennessee Air National Guard, the respondent had been employed as a National Guard Technician as provided in the National Guard Technician's Act of 1968. (32 U.S.C. § 709, Act of Aug. 10, 1956, c. 1041 § 2, 70A Stat. 614; Act of Sept. 13, 1961, P.L. 87-224, § 2, 75 Stat. 496; Act of Aug. 13, 1968, P.L. 90-486, § 2(1), 82 Stat. 755; Act of Aug. 13, 1971, P.L. 92-119, § 2, 85 Stat. 340.) His employment was not unlike that involved in the case of Baum v. Zuckert, 342 F.2d 145 (6th Cir. 1955), which concerned the Air Force Reserve Technician Program. The court there noted that the program was to provide reserve units:

> ". . . which are composed chiefly of personnel who train only a few days each month and two weeks in the summer, with a core of highly trained personnel whose full-time civilian jobs coincide with their military job." 342 F.2d 145, 146.

After termination of his enlistment, the respondent was notified that his employment as a National Guard Technician would be terminated thirty days from the date of notification as he no longer met a condition of his employment; that is, maintenance

of his status as an active member of the Tennessee Air National Guard. 32 U.S.C. § 709(e)(1).

The respondent initiated the present action one year less a day from the termination of his Technician employment. The petitioners responded by filing a motion to dismiss and alternative motion for summary judgment (App. 14-18).

The United States District Court for the Eastern District of Tennessee, Robert L. Taylor, Judge, granted the petitioners' motion to dismiss with an accompanying memorandum opinion. (App. 7-13). The respondent perfected an appeal from that decision and on April 17, 1975 the United States Court of Appeals for the Sixth Circuit in an opinion authored by Robert M. Duncan, Judge, United States District Court for the Southern District of Ohio, sitting by designation, reversed and remanded the case to the District Court holding that ". . . decisions which are made for non-military reasons involving no application of military expertise may well be outside the boundaries of the doctrine of nonreviewability." (App. 5).

This Honorable Court granted the petition for a writ of certiorari to review that decision on October 6, 1975.

SUMMARY OF ARGUMENT

The complaint of the respondent in the instant case did not allege that his commander in refusing to accept his offer of re-enlistment in the Tennessee Air National Guard violated any statute or lawful regulation. It merely attacked regulations, without any specificity, which gave to military commanders the discretion in whether or not to accept a re-enlistment. The complaint alleged no protected interest in re-enlistment in the Tennessee Air National Guard. *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v.*

Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

The National Guard Technicians Act of 1968, 32 U.S.C. § 709, establishes membership in the National Guard as a requisite for employment as a National Guard Technician. The Act did not evidence any Congressional intent to create a protected interest for National Guard technicians in their National Guard membership. The position of the respondent as a federal civil servant does not give rise to a claim for preferential treatment of the respondent as a member of a state's military organization. No statute or regulation concerned created anything more than a subjective expectancy of an enlisted man in re-enlistment.

The allegations in the instant case do not warrant the courts' entry into the area of review of military decisions, an area of governmental activity in which the courts have little competence. *Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973). The courts should not venture into the traditional area of nonreviewability of military decisions. The litigation of the threshold question, whether or not a military decision was made for a military purpose, would have in most cases entailed the litigation of the reasons behind a military decision.

ARGUMENT

A. There Is No Protected Interest in a Re-Enlistment in the National Guard and Respondent Alleged None.

B. The National Guard Technicians Act of 1968 Do Not Create a Special Status in the National Guards of the States for the Federal Civil Servant Technician.

A. A term of enlistment, other than an original enlistment, in the Air Force National Guard may be accepted for any specified period, under regulations to be prescribed by the Secretary of the Air Force. 32 U.S.C. § 302, Act of Aug. 10, 1956, c. 1041, 78 Stat. 601; Act of Oct. 4, 1961, P.L. 87-378, § 5(1), 75 Stat. 808. Re-enlistments, as enlistments, are founded upon a matter of contract principle. In instances where an enlistee has been defectively discharged, recovery has been granted only for the term of the contract—the termination of the enlistment involved. See *O'Callahan v. United States*, 451 F.2d 1390 (Ct. Cl. 1971).[1] Thus, neither the National Guard, nor an enlistee are bound for a period longer than that for which each originally bargained. As the Court of Claims noted in O'Callahan:

> The issue, most clearly stated, is whether the Secretary of any service arm is required to postulate a re-enlistment without exercise of discretion in individual cases. We think that he is not. The principles of efficient management,

[1] O'Callahan had claimed that as he had been illegally discharged, O'Callahan v. Parker, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), his new discharge should not have been back dated to the end of the enlistment period, but should have been dated as of the date of his proper discharge. He had been dishonorably discharged on October 11, 1956; his enlistment expired March 8, 1961; the action changing the type of discharge granted was completed January 12, 1971, with the discharge being effective March 8, 1961. 451 F.2d 1390, 1391.

maintenance of morale, and the continued public trust in our Armed Services require that more substantial discretion be left in the hands of those who manage and maintain the Armed Services. 451 F.2d 1390, 1392-3.

As the respondent's term of enlistment was up, the Guard was under no responsibility or affirmative duty to allow him to re-enlist—that is, the only decision made was a negative one and Dunlap had no interest affected thereby. A mere subjective expectancy is not protected by procedural due process. *Perry v. Sindermann*, 408 U.S. 593, 603, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972). Congress has provided for indefinite enlistments in some cases, 32 U.S.C. § 302(b), but generally has provided for enlistments of specific periods. 32 U.S.C. § 302(a).[2] A periodic enlistment terminates by its own terms and both parties to the enlistment are given the opportunity to make a choice at that time of whether to renew their respective obligations. Neither party is bound beyond that for which he has bargained.

Enlistments in the Tennessee Air National Guard are governed by Air National Guard Manual, ANGM 39-09, "Enlisted Personnel, ENLISTMENT IN THE AIR NATIONAL GUARD AND AS A RESERVE OF THE AIR FORCE, Departments of the Army and the Air Force, National Guard

[2] 32 U.S.C. § 302. Enlistments, reenlistments, and extensions. (a) Under regulations to be prescribed by the Secretary concerned, original enlistments in the National Guard may be accepted for—(1) any specified term, not less than three years, for persons who have not served in an armed force; or (2) any specified term, not less than one year, for persons who have served in any armed force. (b) Under regulations to be prescribed by the Secretary concerned, reenlistment in the National Guard may be accepted for any specified period, or, if the person last served in one of the highest five enlisted grades, for an unspecified period. (c) Enlistments or reenlistments in the National Guard may be extended—(1) under regulations to be prescribed by the Secretary concerned, at the request of the member, for any period not less than six months; or (2) by proclamation of the President, if Congress declares an emergency, until six months after termination of that emergency.

Bureau, Washington, D.C. 20310. Chapter 2, "Instructions for Enlistment and Criteria," dated 10 September 1971 including Change 1, dated 14 March 1972, provides at paragraph 2-10 as follows:[3]

> 2-10. Terms of Enlistment. An individual who enlists in the Air National Guard must concurrently enlist as a Reserve of the Air Force in the same grade for a period equal to his Air National Guard enlistment.
>
> a. PS [prior service] personnel with no MSO [military service obligation] may be enlisted for 1, 2, 3, 4, 5, or 6 years.
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> • • •

Paragraph 1-3a states that "[r]ecruiting and enlistment is the responsibility of the State. . . ."

In his initial complaint, the respondent alleged no right to re-enlist. There is none. He alleged no liberty interest of which he had been deprived by the decision not to accept his re-enlistment. Thus, this case falls within the purview of *Perry v. Sindermann, supra*, and Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548. Paraphrasing *Roth* in regard to any liberty interest which the respondent might have had, the National Guard, in declining to re-enlist the respondent, did not make any charge against him that might seriously damage his standing and association in his community. "[T]here is no suggestion whatever that the respondent's 'good name, reputation, honor or integrity' is at stake." There is no allegation that the Guard in declining to re-enlist the respondent, imposed on

[3] The provisions of Air Force regulation, AFR 35-16 dated 30 May 1975 which relate to the enlistment and reenlistment policies of the regular Air Force are not directly applicable to the Air National Guard by the Department of the Air Force, Headquarters US Air Force, Washington, D.C. 20330, ANG Regulation 0-2, dated 31 March 1975, Indexes, "Numerical Index of Applicable Administrative Publications."

him any stigma or other disability that would foreclose his freedom to take advantage of other employment opportunities. 408 U.S. 564, 574.

In regard to property interests, this Court stated further that:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. 408 U.S. 564, 577.

Again paraphrasing, the respondent has alleged no terms of his prior enlistment which would secure to him any interest in a re-enlistment for another term. The allegations have supported no possible claim of entitlement to re-enlistment. There is no alleged policy of the National Guard to secure to the respondent an interest in re-enlistment or to create any legitimate claim to re-enlistment. *Roth*, 408 U.S. 564, 578. As opposed to Sindermann, the respondent here alleged no interest in the renewal of his re-enlistment contract which might have been fostered by the National Guard. Paraphrasing *Sindermann* he has not claimed any legitimate reliance upon guidelines of the National Guard which provided that an enlisted man in his particular circumstance had some form of job tenure. He has not offered to prove that an enlisted man with his period of service had a "property" interest in continued service with the Guard. 408 U.S. 593, 600-601.

B. The petitioners respectfully submit that the Sixth Circuit Court of Appeals erroneously determined that 32 U.S.C. § 709(e)(3) modified 32 U.S.C. § 709(e)(1) and that the Adjutant General could only terminate a technician for cause. Membership in the National Guard is a requisite for employment. Failure to maintain membership in the National Guard results in a loss of technician employment by operation of law.

Traditionally, the National Guard is not a full-time active force. Its members are ordinary citizens holding regular full-time jobs, but who perform National Guard duty as required by the Governor of the State and the President. In order to be prepared for state duty and federal mobilization, National Guardsmen participate in periodic weekend drills. However, there must be provision for the full-time administration and training of the Guard as well as the maintenance and repair of equipment and the furnishing of supplies.

The reports of both the Committee on Armed Services of the House of Representatives (H.R. Rep. No. 1823, 90th Cong., 2d Sess. (1968)) and the Senate Committee on Armed Services (S. Rep. No. 1446, 90th Cong., 2d Sess. (1968)), spoke of the necessity of what were known as caretakers and clerks, now technicians. Although most of these employees were members of the National Guard, during the normal work week they were civilian state employees maintaining National Guard equipment and caring for the ongoing daily administration and supply needs of the National Guard. However, they received their salaries wholly from federal funds and were required to meet all of the mental, physical and professional qualifications for National Guard membership, under regulations prescribed by the Secretaries of the respective services.

As state employees being paid by federal funds not only was their legal status uncertain, they were ineligible for federal retirement programs and often not covered by state retirement programs. To remedy these matters, Congress enacted the National Guard Technicians Act of 1968 making these technicians federal employees, but leaving the administrative authority at the state level in recognition of the state characteristics of the National Guard.

The Act statutorily recognized previous regulation and practice which required these technicians to be members of the National Guard and to hold a military rank or grade appropriate to their civilian position.

> The concept of the full-time civilian program is that his civilian work will be performed in the same unit in which he holds a mobilization assignment. In other words, the technician would perform his civilian work, his training duty, and be mobilized for active duty in the same unit.
>
> While the foregoing is the general practice the committee did learn in some instances technicians hold military assignments in units different from the units in which they are employed. It is the view of the committee, therefore, that technicians who are required to be military members of the National Guard should occupy a military position which is compatible with their civilian technician position.
>
> The Department of Defense has indicated its informal concurrence with that view. S. Rep. No. 1446 90th Cong. 2d Sess. 20 (1968).

Thus, it is apparent that the Congress chose to defer to the military status of a technician in requiring Guard membership. That is, the provisions of 32 U.S.C. § 709(b) require a military status of these technicians for a military reason. The provisions of 32 U.S.C. § 709(e)(3) provide for a discharge for cause from the civilian employment. The two are separate and distinct. Each was enacted for a separate purpose and each contemplated different circumstances. For example, a technician might be discharged from his technician employment for cause, although his military record would remain unblemished. A Guardsman might also be discharged from the National Guard for cause, and although his technician employment would terminate by operation of law, his civilian employment record would remain unblemished. Also, to be considered are the facts in the instant case wherein the term of enlistment of a National Guardsman had expired; his technician employment would terminate by operation of law, but neither his military nor his civilian record would be blemished.

There is nothing in the committee reports of the House or Senate and there is nothing in the statute itself which would indicate that 32 U.S.C. § 709(e)(1) and (3) should be read together to create a new kind of beast. Nothing in the National Guard Technician Act of 1968 indicates that the technicians were to be given any preferred treatment in their military status as members of the National Guard. Although the statutes provide that a state Adjutant General is the top-level supervisor of a state technician program for normal personnel purposes (32 U.S.C. § 709(e)) and save for the Governor is the commander of a state's National Guard, a subordinate commander in the military chain may or may not be a supervisor for "civilian" personnel matters. And a military commander's evaluation of the performance of his military subordinate may not coincide with a civilian supervisor's evaluation of his "civilian" subordinate—though the subordinate may be the same individual. Certainly, the intent of 32 U.S.C. § 709(b) was to defer to the requirements of the military membership, rather than to the requirements of civilian employment.

The requirements of Guard membership under subsection (b) is paramount to the civilian employment. The decision of the Court of Appeals in the instant case would make them co-equal and would create a bifurcated standard for the military which would wreak havoc with the National Guard system. The Rubicon which borders the realm of judicial nonreviewability of military discretionary decisions should not be bridged by 32 U.S.C. § 709.

The Traditional View of the Nonreviewability of Military Discretionary Decisions Should Not Be Abrogated Under the Facts of the Case at Bar.

There is no allegation in the instant case that the National Guard authorities violated military regulations or that the decision by Guard authorities was not made within the scope of their statutory and regulatory power. The petitioners have not asserted and do not assert that in either of those instances a military decision should avoid judicial scrutiny. In *Harmon v. Brucker*, 355 U.S. 579, 78 S.Ct. 433, 2 L.Ed.2d 503 (1958), it was made abundantly clear that where a military authority, there the Secretary of the Army, acted outside his statutory grant of power, his action could be judicially determined to be illegal. Further, courts have not been reluctant to review matters wherein the military has violated its own regulations and have not hesitated in directing the military to comply with its own regulations where the failure to follow a regulation has resulted in prejudice. *Bluth v. Laird*, 435 F.2d 1065 (4th Cir. 1970). Citing *United States ex rel. Brooks v. Clifford*, 409 F.2d 700 (4th Cir. 1969); *Feliciano v. Laird*, 426 F.2d 424 (2nd Cir. 1970); *Nixon v. Secretary of the Navy*, 422 F.2d 934 (2nd Cir. 1970); *Kimball v. Commandant Twelfth Naval District*, 423 F.2d 88 (9th Cir. 1970); *Pitcher v. Laird*, 421 F.2d 1272 (5th Cir. 1970); *Schatten v. United States*, 419 F.2d 187 (6th Cir. 1969). I*n Smith v. Resor*, 406 F.2d 141 (2nd Cir. 1969), the court noted that the military decisions could be reviewed in order to determine if the rights of an enlisted man under applicable statutes and regulations were violated.

The court went on to state that "purely discretionary decisions by military officials which are within their valid jurisdiction will not be reviewed by this court" citing *U.S. ex rel. Schonbrun v. Commanding Officer, Armed Forces*, 403 F.2d 371 (2nd Cir. 1968). In *Schonbrun* the court considered the effects of the "unmeritorious applications that might be loosed by such interference with the military's exercise of discretion and the effect of the delays caused by these in the efficient administration of personnel who have voluntarily become part of the armed forces." 403 F.2d 371, 375.

When the military has been found to have acted within its statutory authority and when it has been determined that the military has acted in accord with its lawful regulations, courts have not entertained further review. Again, in the instant case there is no allegation that any of the petitioners acted in violation of their statutory authority or in violation of their own lawful regulations.

The gravamen of the complaint of the respondent in the District Court was that his commander determined not to accept his re-enlistment in order to terminate him from his employment as a National Guard Technician pursuant to 32 U.S.C. § 709(e)(1), rather than under the procedures outlined in 32 U.S.C. § 709(e)(3), (4) and (5) concerning discharges for cause. (Complaint of respondent, paragraphs 7, 14, 16; App. 21, 23.)

Therefore, the initial determination must be whether the judiciary should review an otherwise lawfully executed discretionary decision of a military commander in order to determine whether it may have been done for a non-military reason. The Court of Appeals held that decisions which are made for non-military reasons involving no application of military expertise may well be judicially reviewable. (App. 5.)

Congress is given the power under Art I, § 8, cl 16 of the Constitution:

> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to

the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

As the opinion of this Court stated in *Gilligan v. Morgan*, 413 U.S. 1, 93 S.Ct. 2440, 37 L.Ed.2d 407 (1973):

> Congress has enacted appropriate legislation pursuant to Art I, § 8, cl 16, and has also authorized the President—as the Commander in Chief of the Armed Forces—to prescribe regulations governing organization and the discipline of the National Guard. The Guard is an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war. 413 U.S. 1, 6-7.

Congress itself has stated its general policy in regard to the National Guard;

> In accordance with the traditional military policy of the United States, it is essential that the strength and organization of the Army National Guard and the Air National Guard as an integral part of the first line of defenses of the United States be maintained and assured at all times. * * * 32 U.S.C. § 102, Act of Aug. 10, 1956, c 1041, 70A Stat. 597.

Thus, it can be seen that the Framers of the Constitution gave to the Congress the authority to prescribe discipline for the National Guard and that Congress has exercised this power and also authorized the President to prescribe regulations. State National Guard units are effectively bound by these regulations by 32 U.S.C. § 108 by which the National Guard of a state may be barred from receiving money or other aid for failure to comply with or enforce a requirement of Title 32 or regulations thereunder. Act of Aug. 10, 1956, c. 1041, 70A Stat. 600. In Tennessee, the Governor is the Commander in Chief of the military forces of the state. Tenn. Code Ann. § 7-105;[4] Article III, Sec. 5 of the Tennessee Constitution.[5]

As Commander in Chief of the Tennessee National Guard, he is authorized under Tennessee law to issue regulations for organization, government, and discipline of the Tennessee Na-

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[4] *7-105. Commander-in-chief of military forces—Powers—Regulations.*—The governor of this state shall be the commander-in-chief of the military forces, except when they shall have been called into the service of the United States, and is authorized and empowered:

(a) To issue all such orders, rules and regulations as may be necessary to provide for the organization, government, discipline, maintenance, training, and equipment of the Tennessee national guard. All such orders, rules, and regulations issued by the governor shall have the force and effect of law, but they shall conform to the laws and regulations of the United States relating to the organization, discipline, and training of the national guard, to the provisions of §§ 7-101—7-151, 7-301—7-304, 7-311—7-333, 7-401—7-410 and 7-513—7-523 and as nearly as practicable to the laws and regulations governing the U. S. Army and the U. S. Air Force.

(b) Upon the duly and legally constituted call of the president of the United States, to call into service all or any portion of the military forces of the state.

(c) To appoint, commission and determine the grade of all officers and select all warrant officers.

(d) To determine and fix the home station and location of the various units of the Tennessee national guard.

(e) To provide such buildings, facilities and grounds as may be necessary to conduct the various activities of the branches and units of the national guard.

(f) To have, exercise and enjoy such other, further and general powers with respect to the military forces, as may be necessary to execute the provisions of §§ 7-101—7-151, 7-301—7-304, 7-311—7-333, 7-401—7-410 and 7-513—7-523 or any other statute, or any constitutional provision affecting the military forces, as said statutes and constitution may now exist, or with any amendments thereto or changes therein. [Acts 1970 (Adj. S.), ch. 596, § 4.]

[5] Art. III, Sec. 5. Governor as commander-in-chief—Calling out Militia.—He shall be commander-in-chief of the Army and Navy of this State, and of the Militia, except when they shall be called into the service of the United States: But the Militia shall not be called into service except in case of rebellion or invasion, and then only when the General Assembly shall declare, by law, that the public safety requires it.

tional Guard. By statute these orders are to conform to the laws and regulations of the United States relating to the organization, discipline, and training of the National Guard and as nearly as practicable to the laws and regulations governing the U.S. Army and the U.S. Air Force. The Governor also has other, further and general powers with respect to the military forces as may be necessary to execute the provisions of the applicable statutes or any constitutional provisions relating to the military forces. Tenn. Code Ann. § 7-105(a), (f).

Therefore, it is apparent from the United States constitutional provisions, the congressional enactments pursuant thereto, the Tennessee constitutional provisions, and the statutes pursuant thereto that the military falls wholly within the realm of the legislative and executive branches of government within both sovereigns. The judiciary has traditionally shown a reluctance to review otherwise lawful decisions of the military. In *Orloff v. Willoughby*, 345 U.S. 83, 73 S.Ct. 534, 97 L.Ed. 842 (1953), this Court considered a claim of a medical doctor inducted because of his military expertise who sued to have the Army utilize him in a medical position and award him a commission or to discharge him. The doctor had claimed the Fifth Amendment privilege when questioned concerning his membership in certain "subversive" organizations. The government's position in both the District Court and the Court of Appeals was that the doctor, although drafted into the military because of his medical expertise, could be utilized in any position that his commanders saw fit. Both the lower courts agreed with the government's position. However, when the case reached this Honorable Court, the government agreed that the statutes required the doctor to be used in a medical capacity and agreed that the military had failed to so utilize him, but argued that he was not entitled to a commission and that he could be assigned to any particular duties within the medical field. This Court agreed and stated that it would not review assignments since these were peculiarly in the realm of military discretion. "It

is obvious that the commissioning of officers in the Army is a matter of discretion within the province of the President as Commander in Chief." 345 U.S. 83, 90. This Court also considered the question of whether a member of the military may obtain judicial review of his assignments to duty. The Court responded in the negative saying that, "there must be a wide latitude allowed to those in command." 345 U.S. 83, 93.

In the instant case the question is whether the discretionary decision of a military commander to allow a person to re-enlist is judicially reviewable. The petitioners submit that it is not. The language of the court in the *Orloff* decision is applicable to the present factual situation, although it might not today be applied to the facts in *Orloff*. ("This whole episode appears to me to be one of a too-rapidly increasing number to which Americans in a calmer future are not likely to point with much pride." Justice Black in dissent, 345 U.S. 83, 97.)

> We know from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled upon rests upon the Congress and upon the President of the United States and his subordinates. The military constitutes a specialized community governed by a separate from that of the civilian. 345 U.S. 83, 93-94.

Should the courts assume the authority to review decisions of military commanders that persons be denied the right to re-enlist such would be an unwarranted interference with the military's exercise of discretion, and military commanders might be called into court to explain their actions each time a disgruntled service member seeks to have them reviewed. As noted in *Gilligan v. Morgan*, 413 U.S. 1, 37 L.Ed.2d 407, 93 S.Ct. 2440:

It would be difficult to think of a clearer example of the type of governmental action that was intended by the constitution to be left to the political branches, directly responsible—as the Judicial Branch is not—to the elective process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches. The ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability. It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system; . . . 413 U.S. 1, 10.

In *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971), the Court, speaking of *Orloff* noted that courts would not review duty assignments even if discriminatorily made, where there was no question of deprivation of constitutional rights or action beyond the scope of military authority. The petitioners would submit that courts should not review non-assignments—a refusal to accept an enlistment. The Fifth Circuit in *Mindes* established certain criteria to be weighed in determining non-review of military matters. To what extent is military expertise involved: In the instant case the respondent sought to re-enlist. The decision of whether to allow an enlisted member of the Armed Services to re-enlist is a peculiarly military decision. In reaching such a determination, a commander must determine that the person had a particular military occupational specialty that would be necessary for the completion of the mission of his unit. He would of necessity have to consider the qualifications of the applicant for enlistment or re-enlistment along with the qualifications of other persons whose records indicate experience and expertise in that particular military occupational specialty.

Further, a military commander must take into consideration the effect that the enlistment or reenlistment of a particular individual would have on the morale and efficiency of his unit. None of these generally described determinations lend themselves readily to judicial review and all are peculiarly within the realm of a commander's military discretion.

What is the nature and strength of the challenge to the military determination: In the instant case the only "right" which could be effected, although not specifically alleged in the complaint, is the re-enlistment opportunity. See *O'Callahan v. United States*, 451 F.2d 1390 (Ct. Cl. 1971). The only challenge to the military determination was a general challenge to the discretionary powers vested in the commanding officer to determine what is in the best interest of the Tennessee Air National Guard. The respondent asserted in his complaint that the discretion rested in a commander to determine whether or not an enlisted member should be allowed to re-enlist was vague and overbroad. (Complaint, para. 10, 13; App. 22-23). This Court refused to uphold a similar attack on similar language when it was used as a basis for a discharge of a nonprobationary civil service employee in *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974). Here the alleged reason was that to refuse to accept the respondent's offer to re-enlist was "in the best interest" of the Tennessee National Guard. Kennedy had alleged that he was discharged "for such cause as will promote the efficiency of the service." Even in the face of an attack founded on an assertion that the discharge was effected because of the employee's exercise of First Amendment rights, the latter language was not found to be unconstitutionally vague. The respondent did not attack the decision of the military commander as it effected a traditional military purpose. The attack was founded on the idea that the discretion vested in a commander was so broad as to render any exercise of that discretion to be arbitrary and capricious. There is no allegation that the procedures established by law and regulation were not followed.

What is the potential injury to the respondent: In regard to the Tennessee National Guard as a state entity, the respondent alleged absolutely no injury. The technician position of the respondent was terminated by operation of law when his military membership ceased.

To what effect would judicial review interfere with the military: Should this Honorable Court adopt the view of the Sixth Circuit in the instant case and hold that the military must first litigate the threshold question of whether or not a particular decision was made for a military purpose, the petitioners envision a potential for great abuse of the judicial system by disgruntled servicemen who may seek judicial review of a decision made by a military superior. The litigation of the threshold question of the purpose for the decision would in most cases result in the litigation of the merits of the claim itself. The military could conceivably be forced to defend each of its decisions, at least to the extent of proving that a decision was made for a military purpose, rather than for a "secular" one. Thus, even utilizing the *Mindes* criteria, a military commander's decision to refuse to allow re-enlistment should not be reviewed—particularly under the facts of the case at bar as they now exist.

CONCLUSION

For the foregoing reasons the petitioners respectfully submit that the decision of the Court of Appeals of the United States for the Sixth Circuit should be reversed and the decision and order of the United States District Court for the Eastern District of Tennessee dismissing the complaint should be reinstated.

Respectfully submitted

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-95

STATE OF TENNESSEE; WINFIELD DUNN, as Governor of the State of Tennessee and Commander-in-Chief of the National Guard of the State of Tennessee; TENNESSEE AIR NATIONAL GUARD; TENNESSEE AIR NATIONAL GUARD, 134th Air Refueling Group (TAC); MAJOR GENERAL WILLIAM C. SMITH, as Adjutant General of the National Guard of the State of Tennessee; COLONEL ROBERT W. AKIN, as Commander of the 134th Air Refueling Group; LIEUTENANT COLONEL DAVID L. CARTER, as Commander of the 134th Combat Support Squadron; LIEUTENANT COLONEL BOB ARR, as Commander of the 151st Air Refueling Squadron; LIEUTENANT COLONEL WILLIAM D. ASBURY, as Commander of the 134th Supply Squadron; LIEUTENANT COLONEL THOMAS P. WEBB, III, as Commander of the 134th Camron Squadron; and LIEUTENANT COLONEL MARSHALL C. PEIRCE, as 134th Director of Operations,
Petitioners

v.

BILLY DON DUNLAP,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF OF RESPONDENT

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STATE OF TENNESSEE; WINFIELD DUNN, as Governor of the State of Tennessee and Commander-in-Chief of the National Guard of the State of Tennessee; TENNESSEE AIR NATIONAL GUARD; TENNESSEE AIR NATIONAL GUARD, 134th Air Refueling Group (TAC); MAJOR GENERAL WILLIAM C. SMITH, as Adjutant General of the National Guard of the State of Tennessee; COLONEL ROBERT W. AKIN, as Commander of the 134th Air Refueling Group; LIEUTENANT COLONEL DAVID L. CARTER, as Commander of the 134th Combat Support Squadron; LIEUTENANT COLONEL BOB ARR, as Commander of the 151st Air Refueling Squadron; LIEUTENANT COLONEL WILLIAM D. ASBURY, as Commander of the 134th Supply Squadron; LIEUTENANT COLONEL THOMAS P. WEBB, III, as Commander of the 134th Camron Squadron; and LIEUTENANT COLONEL MARSHALL C. PEIRCE, as 134th Director of Operations,
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BILLY DON DUNLAP,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

BRIEF OF RESPONDENT

OPINIONS BELOW

Respondent concurs in the Petitioners' statement pertaining to the opinions below.

JURISDICTION

Respondent does not question the jurisdiction as set forth in Petitioners' brief.

QUESTIONS PRESENTED

Respondent is of the opinion that the Petitioners' brief misstates the issue to be reviewed. One of the issues presented for determination is whether or not a federal court may review a military commander's decision to deny a request for re-enlistment when the complaint, filed in the court, sets forth allegations that the decision was made for other than military reasons and did not involve an application of military expertise. Petition agrees with the additional issue presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "...(N) or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutory Provisions:

32 U.S.C. § 709 (e)(3) (Supp. 1974) provides:

> (3) a technician may, at any time, be separated from his technician employment for cause by the adjuant general of the jurisdiction concerned.

The Respondent accepts the other constitutional and statutory provisions involved as set forth in the Petitioners' brief.

STATEMENT OF THE CASE

Petitioners' statement of the case is inaccurate insofar as it pertains to the relief sought by the Respondent, Billy Don Dunlap, in his complaint filed in the Federal District Court. The complaint sought a judgment declaring the discretion or prerogative allegedly vested in a commander, to decide whether or not it is in the best interest of the Air National Guard to allow a member to re-enlist, as it was used against the Respondent in the instant case, to be so vague and lacking in ascertainable standards or criteria to guide or guage the commander's decision as to be unconstitutional and thereby to have constituted a deprivation of the Respondent's right to due process. The complaint further sought to enjoin the Petitioners from pursuing any action against the Respondent which would be discriminatory in nature or constitute a deprivation of his rights, privileges or immunities. (Petitioners' App. 19-26).

Respondent respectfully makes the following additions to the Petitioners' statement of the case:

The Respondent was originally informed that his commander, in the exercise of his discretion or

prerogative, had decided that it was not in the best interest of the Tennessee Air National Guard to allow his re-enlistment. Thereafter, Respondent continued in his efforts to effect his re-enlistment. Respondent's commander convened a board of officers to consider whether or not the Respondent should be allowed to re-enlist. Although the Respondent requested to be allowed to appear before the board, for the purpose of receiving a fair and impartial hearing, and further requested that he be supplied a copy of any charges or statements made against him, both requests were denied by the Petitioners.

Respondent's complaint alleged that the action taken by his commander and the board of officers was purposeful and intentional action that was calculated to result in effecting the Respondent's discharge from his technician's job with the Tennessee Air National Guard and would place the Respondent in such a position as would frustrate or deny any opportunity for him to effectively pursue an administrative remedy. The complaint further alleged that the Respondent's commander's action was arbitrary, capricious, unreasonable and amounted to an abuse or misuse of his allegedly vested discretion or prerogative and that the commander's and board of officers' action was discriminatory in nature and thereby resulted in a deprivation of certain of the Respondent's rights, privileges and immunities. As a result of the action taken by the Respondent's commander and the board of officers, which action culminated in the Respondent's loss of his membership in the Tennessee Air National Guard and his technician's employment therewith, the Respondent filed this action on January 11, 1974. (Petitioners' App. 19-26).

The Petitioners responded by filing a motion to dismiss and alternate motion for summary judgment to which the Respondent filed a response. (Petitioners' App. 14 and Respondent's App. 1-8).

The Respondent accepts the remainder of the Petitioners' statement of the case as being substantially correct.

SUMMARY OF ARGUMENT

The complaint filed by the Respondent, in the case at bar, contained such allegations of deprivation of constitutional rights, abuse or misuse of allegedly vested discretion or prerogative and actions outside the scope of the military authorities statutory and regulatory authority, as to justifiably warrant a review of the actions of the Respondent's commander and the board of officers. Furthermore, the decision made by the Respondent's commander was a military decision that was made for non-military purposes or reasons.

The Respondent does not seek to have the court to substitute its judgment or reasoning for that of the military authorities, but merely seeks to have the court to make the military authorities exercise their discretion and take action against the Respondent in a permissible manner and in full compliance with the Constitution of the United States and applicable statutes and regulations.

It is clearly evident, that taking all the facts and circumstances, together with the Respondent's past military record, and placing the same in proper perspective, that the Respondent had a justifiable and

reasonable expectation that he would be allowed to re-enlist. Therefore, the Respondent became vested with a valuable "property" interest.

The decision of the Court of Appeals was based on a sound judicial appraisal of the record and all relevant facts involved in this cause. Contrary to the Petitioners' position, the Court of Appeal's opinion was not a departure from the accepted and usual standard of review of military decisions but was in strict conformity therewith and was reiterative of the same. Therefore, if the decision of the Sixth Circuit is allowed to stand, it would not result in an increased potential of review of military decisions.

ARGUMENT

The Respondent, Under the Facts of the Case at Bar, Has a Protectable Interest, in Re-Enlistment in the National Guard, That Is Subject to Judicial Review.

The Respondent agrees, as is well noted in Petitioners' brief, that the courts have historically adopted a doctrine of nonreviewability of military decisions. This doctrine is derived from the courts' "unwillingness to second-guess judgments requiring military expertise." *Mindes v. Seaman,* 453 F. 2d. 197, 199 (5th Cir. 1971), especially where the complaining party seeks to have the court substitute its judgment for that of the military. The Courts have further shown a reluctance to review military matters requiring military expertise wherein there have been established safeguards for the protection of the individual's constitutional rights.

However, the courts have, on numerous occasions, granted review of military matters. In *Harmon v. Brucker,* 355 U.S. 579, 78 S.Ct. 433, 2 L. Ed. 2d 503 (1958), it was held that military matters could be reviewed so that a determination could be made as to whether or not the military authorities acted within the scope of statutory and regulatory authority. This Honorable Court in *Sterling v. Constantin,* 287 U.S. 378, 53 S.Ct. 190, 77 L.Ed. 375 (1932), decided that the allowable limits on military descretion and whether thay have been overstepped, in a particular instance, are judicial questions. Furthermore, in *Schatten v. United States,* 419 F. 2d. 187 (6th Cir. 1969), it was held that while it is not the judiciary to direct the exercise of discretion in a particular way that it is appropriate for the judiciary to require that authorities temper the exercise of their discretion with their own regulations and the laws of the United States.

It is well rooted in our judicial system that for every wrong there exists a remedy. This maxim should find no less application to wrongs committed against an individual, who holds a position in a military organization, than wrongs committed against a person who holds a purely civilian position.

One who is a member of a military unit, whether it be a regular, reserve, national guard or militia type of unit, does not as a result of this particular type of employment, lose or relinquish his constitutional rights, especially his right to procedural due process.

In *Calhoun v. Doster,* 324 F. Supp. 736 (M.D. Ala. 1971), the plaintiff, a member of the Alabama Air National Guard and a technician therewith, brought an action for deprivation of his rights. In holding that the

plaintiff was entitled to his constitutional rights, even though a member of the Air National Guard, the Court noted a Page 743, as follows:

> The law is quite clear in this Circuit that an individual, in assuming public employment, retains all the rights and privileges otherwise afforded him by the United States Constitution. *Orr v. Thorpe,* 427 F. 2d 1129 (5th Cir. 1970); *Pred v. Board of Public Instruction,* 415 F. 2d 851 (5th Cir. 1969). One of these constitutionally protected rights is that of the individual to be free from arbitrary and unreasonable conduct on the part of the government . . . .

It is the position of the plaintiff that, although he was a member of the Tennessee Air National Guard and employed as a technician therewith, he retained all of the rights, privileges and immunities granted and guaranteed to individuals by the Constitution and laws of the United States, including the right not to be subjected to the arbitrary, unreasonable and unconstitutional actions of the Petitioners and the right to due process and equal protection.

The Honorable Justice Douglas in his opinion in *Winters v. United States,* 89 S. Ct. 57, stated at Page 59-60, as follows:

> ....There are those who in tumultous times turn their faces the other way saying that it is not the function of the courts to tell the Armed Forces how to run a war. Of course that is true. But it is the function of the courts to make sure, in cases properly coming before them, that the men and women constituting our Armed Forces are treated

> as honored members of society whose rights do not turn on the charity of a military commander. As stated in *Ex Parte Milligan,* supra, civil liberty and unfettered military control are irreconcilably antagonistic. A member of the Armed Forces is entitled to equal justice under law not as conceived by the generosity of a commander but as written in the Constitution and engrossed by Congress in our Public Laws.

The Respondent's complaint clearly raised an issue as to whether or not his commander and the board of officers had acted outside the scope of their statutory and regulatory authority, in that their actions were arbitrary, capricious, unreasonable and an abuse or misuse of his commander's allegedly vested discretion or prerogative and were purposeful and intentional actions that were calculated to result in the Respondent's loss of his employment as a technician and would further frustrate or deny the Respondent an effective method of administrative review. (Complaint of respondent, paragraphs 7, 14, 16, 17 and 18; Petitioners' App. 21, 23 and 25).

Once the Respondent's commander convened the board of officers to hear charges and statements against the Respondent, he became clothed with the right to receive a copy or be informed of the charges or statements to be made against him and the right to appear and/or be represented in order to receive a fair and impartial hearing before the board, rights which are a vital part of the Respondent's entitlement to procedural due process. The actions of the commander, in refusing the Respondent the right to receive a fair and impartial hearing, were outside his scope of statutory and regulatory authority and constituted arbitrary and

unreasonable actions which infringed on and denied the Respondent his constitutional right of procedural due process. Therefore, in accordance with *Harmon v. Brucker, supra,* the Respondent's commander's decision and actions are clearly subject to judicial review.

The Respondent further contends that the decision made by his commander is subject to judicial review inasmuch as the Respondent's complaint alleged that the discretion or prerogative allegedly vested in his commander to decide whether or not to allow a member to re-enlist, as it was used against the Respondent to deny his re-enlistment, is so vague and lacking in objective or ascertainable standards or criteria to guide or guage the commander's decision as to be unconstitutional, and therefore constituted arbitrary and unreasonable action which infringed on and denied the Respondent his constitutional rights of due process and equal protection. Also, the Respondent has been unable to discover any statute or regulation which vests his commander with this alleged discretion or prerogative and the Petitioners have totally failed to allege that such a statute or regulation exists and therefore the Respondent entertains serious doubt as to the existence of the same. However, even if this alleged discretion or prerogative exists the Respondent does not contend that this Honorable Court should or could substitute its thinking for that of the commander's, but would assert that there was an abuse, of this alleged discretion or prerogative, which amounted to a denial of the Respondent's rights and that Federal Courts are empowered with the necessary authority to grant the Respondent relief from this abuse.

As the Petitioners have noted in their brief, the United States Court of Appeals for the Fifth Circuit in

the case of *Mindes v. Seaman,* 453 F. 2d 197 (5th Cir. 1971) at page 201, set forth certain factors which should guide a court in deciding whether or not to review military matters. The Fifth Circuit held that as a primary consideration there should be no judicial review of internal military affairs in the absence of an allegation of the deprivation of a constitutional right or a claim that the military violated or failed to follow its own regulations or the applicable statutes. However, the Fifth Circuit went further and stated that a district court, which has been presented with sufficient allegations to meet the primary considerations for review, must examine the substance of the allegations, using certain factors, in order to make a determination as to whether or not review of the military matters are justified in the particular case. The factors which were indicated were: (1) the nature and strength of the plaintiff's challenge to the military determination, with constitutional claims normally being more important than those having only a statutory or regulatory base, (2) the potential injury that the plaintiff could suffer if review is denied, (3) the type and degree of anticipated interference with the military function if review is granted, however, interference per se is insufficient since there will always be some interference when review is granted, and, (4) the extent to which the exercise of military expertise or discretion is involved.

An application of the factors set forth in *Mindes v. Seaman, supra,* to the allegations in the Respondent's complaint, filed in the District Court, justifiably indicates that there should have been a review of the commander's and the board of officers' actions. The Respondent's complaint alleged both a deprivation of his constitutional rights and a violation, by his commander, of applicable statutes or regulations. The

alleged deprivation of the Respondent's constitutional rights were the result of his commander's refusal to allow him to appear and/or be represented before the board of officers for the purpose of receiving a fair and impartial hearing, his commander's refusal to furnish him with a copy of the charges or statements to be made against him before the board and further that the alleged prerogative or discretion vested in the Respondent's commander was unconstitutional inasmuch as it was not particulary delineated. The Respondent alleged that there was a violation of the applicable statutes or regulations, by his commander, inasmuch as the commander's actions were arbitrary, capricious, unreasonable and an abuse or misuse of his allegedly vested discretion or prerogative and were purposeful and intentional actions that were calculated to result in the Respondent's discharge from his technician's employment. Respondent insists that these allegations are not tenuous of frivolous, but are of such a substantial nature as to demand review.

The Respondent asserts that, as a result of the Petitioners' actions, he has been caused to suffer substantial injury. The Respondent had, until his date of discharge, accrued approximately 17-½ years of creditable time toward the 20 years required for his military retirement benefits. He had a reasonable expectation that he would be allowed to re-enlist and thereby complete the remaining 2-½ years required for him to be entitled to his retirement benefits. The actions of the Petitioners not only deprived the Respondent of these retirement benefits, but it had the result of causing him to lose his technician position with the Air Guard. Additionally, the Respondent's age now presents a hardship in his efforts to provide for his future. Therefore, the potential injury to the Respond-

ent, if review is denied, is of a real and substantial nature.

The Respondent had more than a mere subjective expectancy of re-enlistment. Respondent's past military record, including his creditable time in service, various awards and citations presented to him for his performance of duty and prior re-enlistments, were such as to create a reasonable and justificable expectation of re-enlistment which is subject to the protection of procedural due process.

The instant case is distinguishable from *Turner v. Egan,* 414 U.S. 1105, affirming 358 F. Supp. 560 (D. Alaska 1973), wherein judicial review was denied. In *Turner* the plaintiffs were not retained in the National Guard, however, they were presented an opportunity to appear before the board which was to decide whether or not they should be retained in the National Guard. Furthermore, it was shown that the plaintiffs were honorably discharged after more than 20 years of creditable service time and were therefore entitled to full retirement benefits. However, in the case at bar, the Respondent was denied an opportunity to appear before the board and he has no entitlement to any of the retirement benefits which are a valuable property interest.

The complaint filed by the Respondent in the Federal District Court contained allegations that the decision, made by the Respondent's commander, not to allow the Respondent to re-enlist, was made for non-military reasons. It is obvious that taking the Respondent's allegations and construing them most favorably to him at this point in the proceedings that they raise a genuine issue as to his interest in continued employment with the

Tennessee Air National Guard. See *Perry v. Sindermann,* 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972).

A review of the commander's action, in this case, would not seriously impede the Air Guard in the performance of its mission and to require the Petitioners to grant the Respondent his constitutional rights to due process and equal protection would result in very little, if any, interference with the military function of the Tennessee Air National Guard. The Petitioners are misguided in the conviction that if the Sixth Circuit's decision, in the instant case, is allowed to stand that it presents the potentiality for tremendous abuse and would thereby cause much interference with the military function. The Sixth Circuit's decision was in conformity with previous established criteria for judicial review of military matters.

The Respondent does not contend that the judiciary should substitute its judgment for that of his commander, but merely contends that the court should require that the alleged discretion or prerogative be tempered to such an extent so as to not be unreasonable and arbitrary and thereby amount to a denial of the Respondent's constitutional rights. Further, the Respondent's position is that there is no military expertise or discretion involved when, as the Respondent alleged, the decision was made for other than military reasons.

The Court of Appeals, in its decision in the instant case, correctly and aptly noted that the threshold question, for a court in deciding whether the doctrine on nonreviewability of military decisions is applicable in a particular case, must of necessity be directed primarily

toward the nature of the decision which a party seeks reviewed and not the mere identity of the decision-maker. The Court further noted that decisions may be outside the boundaries of the doctrine of nonreviewability when they are made for non-military reasons involving no military expertise.

Petitioners' assertion that the Sixth Circuit Court of Appeals erroneously decided that 32 U.S.C. §709(e)(3) modified 32 U.S.C. §709(e)(1) is without merit. The Sixth Circuit simply stated that, in view of the allegations in the complaint, which have to be construed most favorably to the Respondent, that the Petitioners' had used the Respondent's military aspect of his employment in order to remove him from the civilian aspect. Further, that 32 U.S.C. §709(e)(3) provided a method of removing the Respondent from his technician's employment and that the Respondent's commander's decision to refuse his re-enlistment in order to remove him from his technician's job constituted a military decision made for a non-military reason and is therefore subject to judicial review. For the Court of Appeals to have held otherwise would have been to allow the Respondent's commander and the board of officers, through their constitutionally impermissible conduct and actions, an abuse or misuse of allegedly vested discretion and actions outside of their scope of statutory and regulatory authority, to do through the back door that which they could not do through the front door.

Furthermore, Petitioners' statement, that the Sixth Circuit's decision makes 32 U.S.C. §§709(b) and (e)(3), co-equal with the result of creating a bifurcated standard for the military which would wreak havoc, is also without merit. The Court of Appeals decision

correctly determined that each statute must be read, kept and utilized in its proper perspective instead of in some impermissive manner.

A literal reading and interpretation of Petitioners' brief would indicate that the Petitioners' labor under the belief that a complaining party could or should not be allowed judicial review of a military decision even if there were allegations that the decision was based on impermissible constitutional, statutory and regulatory considerations such as the complaining party's race or sex.

CONCLUSION

For the foregoing reasons the Respondent respectfully submits that the decision of the United States Court of Appeals for the Sixth Circuit is judicially correct and should be affirmed in all respects.

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No. 75-95

In the Supreme Court of the United States

OCTOBER TERM, 1975

STATE OF TENNESSEE, ET AL., PETITIONERS

v.

BILLY DON DUNLAP

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-95

STATE OF TENNESSEE, ET AL., PETITIONERS

v.

BILLY DON DUNLAP

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will discuss the question whether a military commander's denial of a National Guard Technician's application for re-enlistment in the National Guard is subject to judicial review.

INTEREST OF THE UNITED STATES

Petitioners raise the broad question whether, and, if so, to what extent, a military commander's decision to deny re-enlistment to enlisted personnel is subject to judicial review. A decision on this broad question could significantly affect the interests of the military services of the United States.

Moreover, this question arises in a context in which the interests of the United States are directly

implicated. Respondent challenges a decision by the Tennessee Air National Guard denying his application for re-enlistment. As a consequence of that refusal, respondent's membership in the National Guard expired at the end of his term of enlistment, and he became ineligible to continue in his civilian employment as a National Guard Technician under the National Guard Technicians Act of 1968, 32 U.S.C. 709. That Act is administered by the adjutants general of the States under regulations issued by the Secretaries of the Army and the Air Force, and National Guard Technicians employed thereunder are employees of the United States. Thus, the decision in this case may directly affect respondent's employment rights with the United States.

Furthermore, by agreement with the Civil Service Commission, both the Army and the Air Force have established Reserve Technician programs essentially similar to the National Guard Technician program. The decision in this case may affect the operation of those Reserve Technician programs.

STATEMENT

From 1967 through 1972, respondent was an enlisted member of the Tennessee Air National Guard; during that time, he also was employed as an Air National Guard Technician under the National Guard Technicians Act of 1968, 32 U.S.C. 709 (Pet. App. B, p. A–7). Membership in the National Guard was a condition of respondent's employment under that Act. National Guard Technicians are members of the National Guard who have been employed in a civilian

capacity to perform paramilitary duties for their unit during the regular work week. See pp. 5–7, *infra*. The Act provides that a National Guard Technician "who is separated from the National Guard * * * shall be promptly separated from his technician employment * * *." 32 U.S.C. 709(e)(1); see also 32 U.S.C. 709(b).

Respondent's final term of enlistment expired on December 8, 1972 (Pet. App. B, p. A–7). Prior to that date, respondent submitted an application for reenlistment, which was denied by the commanding officer of his unit; an advisory board of officers convened by the commanding officer concurred in the denial (*id.*, at pp. A–7 to A–8). Accordingly, respondent was discharged from the National Guard on December 8, 1972 (*id.*, at p. A–8).

Shortly thereafter, respondent received notification that his employment as a National Guard Technician would be terminated effective January 12, 1973, because of his separation from the National Guard (Pet. App. B, p. A–8). His employment as a National Guard Technician was duly terminated on that date (*id.*, at p. A–7). Respondent appealed his separation from employment to the Adjutant General of the Tennessee National Guard (see 32 U.S.C. 709(e)(5)), who apparently denied relief.[1]

[1] Respondent's papers do not show the disposition of his administrative appeal. The courts below treated the appeal as having been decided adversely to respondent (Pet. App. A, p. A–3). Petitioners have not suggested that respondent failed to exhaust his administrative remedies.

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Respondent then instituted this action in the United States District Court for the Eastern District of Tennessee, contending that he had been unlawfully denied re-enlistment in the National Guard and seeking both re-enlistment and reinstatement as an Air National Guard Technician with back pay. In particular, respondent alleged that the denial of his application for re-enlistment "was calculated to culminate in [respondent's] discharge from his technician's job and * * * frustrate or deny any opportunity for him to effectively pursue an administrative remedy" (Pet. App. D, p. A–23). The district court granted petitioners' motion to dismiss, holding that it was "without the power to review the denial of [respondent's] request for re-enlistment in the Tennessee Air National Guard, in the absence of extraordinary circumstances" (Pet. App. B, p. A–13).

The court of appeals reversed. The court recognized the existence of the "doctrine of nonreviewability of military decisions" (Pet. App. A, p. A–4) but concluded that "decisions which are made for non-military reasons involving no application of military expertise [are] outside the boundaries of the doctrine of nonreviewability" (*id.*, at p. A–5). The court assumed that a decision to deny re-enlistment "made for the purpose of affecting a guardsman's technician employment" was not one made "for military reasons" (*ibid.*). The court further noted that during his term of enlistment, a National Guard Technician may be removed from employment as a technician only "for cause" (32 U.S.C. 709(e)(3)), and it concluded that

judicial review of the grounds for the denial of respondent's application for re-enlistment was necessary to vindicate his "'* * * interest in * * * continued employment' as a technician with the Tennessee Air National Guard" (Pet. App. A, p. A–6).

The court remanded to the district court to provide respondent "an opportunity to prove his allegation that [his commanding officer's] decision [to deny the application for re-enlistment] was made for other than military reasons" (*ibid.*).

INTRODUCTION AND SUMMARY OF ARGUMENT

Proper analysis of this case requires an understanding of the nature of civilian employment as an Air National Guard Technician. Under the National Guard Technicians Act of 1968, 32 U.S.C. 709, membership in the Air National Guard is a prerequisite to initial employment as an Air National Guard Technician (32 U.S.C. 709(b)) and is a condition of a Technician's continued employment (32 U.S.C. 709(e)(1)).[2] Technician positions are a hybrid of military responsibility and civilian employment. During the regular work week, the Technician is

[2] The Secretary of the Air Force may by regulation exempt Technicians from the requirement of membership in the National Guard. 32 U.S.C. 709(b). The purpose of this provision is to permit exemption of a very limited number of non-combat personnel, such as secretaries and clerk-typists. H.R. Rep. No. 1823, 90th Cong., 2d Sess. 6–7 (1968). Exempted positions are held in the competitive civil service. 32 U.S.C. 709(d). However, combat personnel such as respondent have not been exempted from the requirement of membership in the National Guard, and the discussion in this brief will focus exclusively upon Technicians who are subject to that requirement.

assigned to the National Guard unit of which he is a member, and he discharges essentially military responsibilities in his capacity as a civilian employee. At weekend drills of the unit, the Technician continues to carry out the same responsibilities, but in his capacity as a member of the National Guard.

The purpose of the Technician program is to maintain the combat readiness of the National Guard. H.R. Rep. No. 411, 92d Cong., 1st Sess. 5 (1971).[3] The Technicians are the heart of a National Guard unit. They provide a nucleus of highly trained soldiers who are prepared to perform the operational functions of a main force military unit from the instant of mobilization, while simultaneously training the remaining members of the unit in their military responsibilities. *Ibid.* See *Baum* v. *Zuckert*, 342 F. 2d 145, 146 (C.A. 6). Such a nucleus of essentially on-duty soldiers is especially important in maintaining the preparedness of an Air National Guard unit, which is expected to be ready for combat or mission deployment within 48 hours of mobilization. H.R. Rep. No. 411, *supra*, at 5.

Membership in the National Guard is a condition of employment as a Technician because military service is a concomitant of the Technician's job responsibilities;[4] to fulfill the purpose of his employment, the Technician must train with his unit and enter active duty with his unit when it is mobilized. 32 U.S.C.

[3] The Act authorizes civilian employment of 53,100 Technicians. 32 U.S.C. (Supp. I) 709(h).

[4] The constitutionality of this requirement was upheld in *Local 571, National Army & Air Technicians Association* v. *Brink*, D. D.C., No. 2688–70, decided June 20, 1972.

709(b); H.R. Rep. No. 411, *supra*, at 2; H.R. Rep. No. 1823, 90th Cong., 2d Sess. 1–2 (1968). Although nominally civilian,[5] as a practical matter employment as a Technician is military in nature.[6]

1. As an enlisted member of the Tennessee Air National Guard, respondent had no entitlement to re-enlistment. While the armed services are empowered to accept enlistments in the National Guard, the authorizing statute confers no right of re-enlistment upon a member that would affect the military's otherwise absolute discretion in manpower selection. The regulations issued by the Secretary of the Air Force for processing applications for re-enlistment in the Air National Guard did not grant respondent even a qualified right of re-enlistment. The regulations provide that re-enlistment decisions are subject to the exercise of discretion at several levels within the military command structure. Similarly, respondent's con-

[5] A Technician holds his position in the noncompetitive federal civil service. 32 U.S.C. 709(d); H.R. Rep. No. 1823, *supra*, at 6. Until 1968, Technicians were state employees. H.R. Rep. No. 411, *supra*, at 1–2. In that year, they were made federal employees. 32 U.S.C. 709. But in passing the National Guard Technicians Act, Congress recognized the military nature and state character of the Technician program by authorizing the state adjutants general to continue to hire and supervise the Technicians, subject to regulations promulgated by the Secretaries of the Army and Air Force. 32 U.S.C. 709(c). H.R. Rep. No. 1823, *supra*, at 11–12. See Hearings on S. 3865 before Subcommittee No. 2 of the House Armed Services Committee, 90th Cong., 2d Sess., p. 10179 (1968).

[6] There is controversy over whether Technicians may be required to wear military uniforms while acting in their "civilian" capacities. See, *e.g.*, *Montana Chapter of Association of Civilian Technicians, Inc.* v. *Young*, 514 F. 2d 1165 (C.A. 9); *Bruton* v. *Schnipke*, 370 F. Supp. 1157 (E.D. Mich.).

tract of enlistment in the Air National Guard did not establish any express or *de facto* right to re-enlist.

Furthermore, respondent's status as a National Guard Technician created no greater entitlement to re-enlistment than that pertaining to any other member of the National Guard. While he maintained membership in the National Guard, respondent had a limited property interest in continued civilian employment, since by statute he could only have been removed for failure to meet military security standards or for cause. 32 U.S.C. 709(e)(2) and (3). But that interest did not survive the expiration of his enlistment. His status as a Technician did not confer any independent right thereafter to remain a member of the National Guard or in any way affect his exposure to the untrammeled military discretion in personnel retention decisions. See *Turner* v. *Egan*, 414 U.S. 1105, affirming 358 F. Supp. 560 (D. Alaska).

Respondent does not allege that his commanding officer denied his application for re-enlistment for constitutionally impermissible reasons or failed to follow applicable regulations. Absent such allegations, that decision is not subject to judicial review because there are no limitations on the commanding officer's discretion in retaining members of his unit, and thus no standards against which the propriety of his decision could be measured. Respondent's position was analogous to that of other federal employees whose employment is not protected by statute: he was subject to removal at the will of his superiors. *E.g., Cafeteria*

& Restaurant Workers Union v. *McElroy*, 367 U.S. 886. Therefore, even if it were assumed *arguendo* that respondent's application was rejected for non-military reasons, the court of appeals erred in holding that the denial could be reviewed by the judiciary.

2. Even if there were determinable standards against which to assess the commanding officer's exercise of discretion, the decision of the court of appeals nonetheless violates the longstanding judicial principle of noninterference with internal military decisions. In order to avoid unnecessary interference with military activities, federal courts have declined to review military personnel decisions absent strong justification. Respondent's mere contention that his superior officer abused a broad discretionary power in terminating his service did not provide a sufficient basis for subjecting the military decision to judicial scrutiny. *Reaves* v. *Ainsworth*, 219 U.S. 296.

The court of appeals held, however, that military decisions made for non-military reasons, and thus not requiring application of military expertise, are reviewable by the judiciary (Pet. App. A, pp. A–4 to A–5). This approach would require the courts to make an initial determination whether a military decision was made for military reasons, a burdensome process that would itself require application of military expertise and therefore implicate the factors supporting the noninterference doctrine. See *Mindes* v. *Seamans*, 453 F. 2d 197 (C.A. 5). Moreover, the decision of the

court of appeals improperly failed to recognize that the staffing of the armed forces, including consideration of applications for re-enlistment, necessarily requires exercise of specialized military judgment in personnel selection.

Finally, given the interrelationship of a National Guard Technician's military and civilian responsibilities, the rejection of respondent's application for re-enlistment, even if undertaken for the purpose of terminating his employment as a Technician without a showing of cause, was an inherently military decision that is not subject to review by the federal courts.

ARGUMENT

A MILITARY COMMANDER'S DENIAL OF AN AIR NATIONAL GUARD TECHNICIAN'S APPLICATION FOR RE-ENLISTMENT IN THE AIR NATIONAL GUARD IS NOT SUBJECT TO JUDICIAL REVIEW

The decision of the court of appeals turned upon its view of the proper scope of "the doctrine of nonreviewability of military decisions" (Pet. App. A, p. A–4). For the reasons set forth below (pp. 19–24, *infra*), we believe that the court of appeals misconstrued and misapplied that doctrine. But we further believe that, without regard to whether the denial of an Air National Guard Technician's application for re-enlistment is a decision military or non-military in character, it is nonreviewable because it is committed to the discretion of the decision-maker. It is to that argument that we first turn.

A. SINCE THE DENIAL OF AN APPLICATION FOR RE-ENLISTMENT AFFECTS NO PROTECTABLE INTEREST, IT IS NONREVIEWABLE WITHOUT REGARD TO WHETHER IT IS BASED UPON MILITARY CONSIDERATIONS

1. An ordinary member of the Air National Guard has no protectable interest in re-enlistment

A member of the National Guard has no statutory entitlement to re-enlistment. Although the statute authorizing the military services to accept re-enlistments establishes certain minimum qualifications (32 U.S.C. 313(a)), it does not grant any enlistee an affirmative right of re-enlistment.[7] It prescribes no set of conditions that, if fulfilled, entitle a member to re-enlistment. To the contrary, the decision on re-enlistment is committed to the discretion of the Secretary of the Air Force, who is authorized to "accept" re-enlistments in the Air National Guard. 32 U.S.C. 302(b).[8]

The Secretary's regulations do not circumscribe his discretion in any way relevant to this case. The processing of applications for re-enlistment is governed

[7] In contrast, certain limited classes of soldiers in the regular armed forces have a right to re-enlist. For example, an Air Force enlistee who serves as an officer in the Air Force or Air Force Reserve under temporary appointment is entitled to re-enlist in his former enlisted grade. 10 U.S.C. 8258. ~~In the absence of such a provision there is no right of re-enlistment in the regular armed forces former enlisted grade. 10 U.S.C. 8258.~~ Under special circumstances, Congress has from time to time enacted legislation providing soldiers on active duty a qualified right of re-enlistment. See *Diamond* v. *United States*, 344 F. 2d 703 (Ct. Cl.). These statutes, however, are no longer in force. In the absence of such a provision, there is no right of re-enlistment in the regular armed forces. *E.g.*, *O'Callahan* v. *United States*, 451 F. 2d 1390 (Ct. Cl.). See U.S.C. 505(e), 508, and 511.

[8] Moreover, in time of peace the Secretary is authorized to terminate a member's term of enlistment without cause. 32 U.S.C. 322(c).

by Air National Guard Manual 39–09.[9] An application for re-enlistment is subject to review by, and requires the approval of, multiple authorities within the military chain of command. *E.g.,* Manual, *supra,* paragraph 2–11 at pp. 2–9 to 2–10; see also *id.,* at p. A1–1. But the Manual does not create any right of re-enlistment, qualified or unqualified. With regard to "voluntary extension of enlistment", the Secretary's regulations simply provide that "[a]n enlistment or re-enlistment may be extended when an individual desires to continue in his Air National Guard status without a break in service." Paragraph 2–11 p. 2–9 (emphasis added). Like the authorizing statute, the regulations prescribe no set of conditions that, if fulfilled by a member, entitle him to re-enlistment.

Nor does a member's contract of enlistment establish any right to re-enlist. The relationship between a member and the Air National Guard, like that between an enlisted soldier and his military service, is contractual. Cf. *Bell* v. *United States,* 366 U.S. 393, 402–404. But standard fixed-term enlistment contracts, such as that governing respondent's membership in the Air National Guard, confer no right of re-enlistment. See, *e.g., O'Callahan* v. *United States,* 451 F. 2d 1390 (Ct. Cl.). Furthermore, there is no claim here that the Air National Guard follows a *de facto* re-enlistment policy that would establish a founded expectation of re-enlistment. Cf. *Perry* v. *Sindermann,*

[9] This Manual became effective September 10, 1971, and was amended March 14, 1972, before the expiration of respondent's last term ofenlistment.

408 U.S. 593. Accordingly, an ordinary member of the Air National Guard has no right of re-enlistment.

For similar reasons, the courts have consistently held that an enlisted soldier in the regular armed forces has no right of re-enlistment. See *O'Callahan* v. *United States, supra.* See generally Comment, *Back-Pay Issues in the Military: O'Callahan* v. *United States,* 10 San Diego L. Rev. 194, 199–201 (1972). Compare *Sims* v. *Fox,* 505 F. 2d 857 (C.A. 5). Thus in a suit brought by a former enlisted soldier for back pay on account of wrongful discharge during a fixed term of enlistment, damages are measured from the date of discharge to the date on which the term of enlistment would otherwise have expired; damages are not awarded beyond the latter date, for discretion to grant re-enlistment would otherwise have been exercised in the plaintiff's favor. *E.g., Bray* v. *United States,* 515 F. 2d 1383 (Ct. Cl.), *Davis* v. *United States,* 196 Ct. Cl. 517.[10]

2. An Air National Guard Technician has no more entitlement to re-enlistment than any other member of the Air National Guard

Although the National Guard Technicians Act does create certain limited tenure rights, an Air National Guard Technician has no special statutory entitlement to re-enlistment. During his membership in the National Guard, a Technician may be removed from his civilian employment only for failure to meet pre-

[10] In contrast, where the term of enlistment is indefinite, the government's liability for back pay for wrongful discharge extends from the date of discharge to the date that action is corrected. See *Hamlin* v. *United States,* 391 F. 2d 941 (Ct. Cl.); *Garner* v. *United States,* 161 Ct. Cl. 73.

scribed standards of military security or for other sufficient cause. 32 U.S.C. 709(e)(2) and (3). See also H.R. Rep. No. 1823, 90th Cong., 2d Sess. 11–12 (1968).[11] Thus, the statute confers a limited property interest in continued employment, while a Technician maintains membership in the National Guard.[12]

That interest, however, expires with the termination of that membership.[13] The Act is explicit that a Technician "who is separated from the National Guard * * * shall be promptly separated from his technician employment * * *." 32 U.S.C. 708(e)(1).[14]

Nothing in the Act or regulations thereunder qualifies or limits the military's discretion to separate a Technician from the National Guard; nothing in the Act or regulations confers upon a Technician, any more than upon other members of the National Guard,

[11] Of itself, such removal does not affect the Technician's membership in the Guard. See *Chaudoin* v. *Atkinson*, 494 F. 2d 1323 (C.A. 3).

[12] In his civilian capacity, a Technician may appeal from an adverse personnel decision, but only to the state adjutant general (32 U.S.C. 709(e)(5)); the removal of a Technician from his civilian employment during his membership in the National Guard implicates the procedural protections of due process. See *Davis* v. *Vandiver*, 494 F. 2d 830 (C.A. 5); *Chaudoin* v. *Atkinson*, 494 F. 2d 1323 (C.A. 3).

[13] By regulation, an Air Force Reserve Technician may retain his civilian employment if his separation from the Reserve was for reasons outside his control. See *Rolles* v. *Civil Service Commission*, 512 F. 2d 1319 (C.A. D.C.). A National Guard Technician has no comparable right.

[14] The reason for that provision is clear: a Technician cannot carry out the paramilitary responsibilities of his position without belonging to the National Guard. See pp. 5–7, *supra*.

any right or entitlement to remain or re-enlist in the Guard. In refusing to provide Technicians with such an entitlement, Congress intended that Technicians would be subject to the military's judgment on personnel retention on the same footing as other members of the National Guard, and that their retention of civilian employment would depend upon the exercise of that judgment. See Hearings on H.R. 2 before the Senate Committee on Armed Services, 90th Cong., 1st Sess. 221–222 (1967).

The statutory scheme governing Technicians is therefore simple and straightforward. As long as a Technician is permitted to remain in the National Guard, he retains a qualified right to continue in his employment as a Technician. But his status as a Technician carries with it no right to remain a member of the National Guard. Indeed, this Court apparently recognized in *Turner* v. *Egan*, 414 U.S. 1105, affirming 358 F. Supp. 560 (D. Alaska), that employment as a National Guard Technician creates no protectable interest in continued membership in the Guard. There, former Air National Guard officers who had been employed as Technicians while in the Guard challenged their forced retirement and consequent removal from civilian employment. In dismissing the officers' complaint, the three-judge district court implicitly found, *inter alia*, that the officers' employment as Technicians had not enlarged their right to remain in military service,[15] and this Court affirmed.

[15] The district court further concluded that the propriety of the military decision to retire the officers was nonjusticiable. See pp. 19–22, *infra*.

In short, a Technician, like any other member of the National Guard, may be denied re-enlistment for any reason or for no reason (within pertinent constitutional limitations), and during time of peace he may also be separated from the Guard without cause pursuant to regulation. 32 U.S.C. 322(c). Upon separation from the Guard for any reason, the Technician becomes ineligible for continued employment under the Technicians Act.

3. Since a National Guard Technician has no protectable interest in re-enlistment, a military commander's denial of a Technician's application for re-enlistment represents an exercise of nonreviewable discretion

As we have shown (pp. 11–16, *supra*), the decision to grant or deny a National Guard Technician's application for re-enlistment in the National Guard is initially committed to the discretion of his commanding officer and thereafter to the discretion of higher military authorities; no statutory or regulatory prescriptions circumscribe that discretion. A military commander's decision on a Technician's application for re-enlistment is therefore nonreviewable for the fundamental reason that there are no meet standards for judicial rview: there is no set of facts that the Technician could establish that would entitle him to reversal or vacation of the denial of his application.[16]

[16] This general rule is subject to qualifications not pertinent to this case. For example, review would be available to a Technician who challenged the denial of his application for re-enlistment on the ground that it had been motivated by a constitutionally impermissible consideration such as race. See, *e.g.*, *Wieman* v. *Updegraff*, 344 U.S. 183, 191–192; *Mindes* v. *Seamans*, 453 F. 2d 197 (C.A. 5). Cf. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 100. Review would also be available to determine whether there had been compliance with the procedures established by regulation. See *Harmon* v. *Brucker*, 355 U.S. 579, 582. Review is available in those circumstances because the Constitution or regulations establish a standard against which official conduct can be judicially measured.

Similarly, where the denial of re-enlistment was explicitly predicated upon charges that were injurious to the Technician's reputation, due process considerations might entitle the Technician to an opportunity to clear his name (but not to review of the denial of re-enlistment *per se*). See *Board of Regents* v. *Roth*, 408 U.S. 564, 573.

This case involves no such complications, however. Respondent has not alleged that the denial of his application for re-enlistment was motivated by constitutionally impermissible considerations; that his commanding officer, in reviewing the application, failed to comply with the procedures established by regulation; or that the denial affected any constitutionally protected liberty interest in reputation. See also pp. 20–21, *infra*.

In this respect, a Technician who seeks to challenge the denial of his application for re-enlistment is in the same position as that occupied by federal civilian employees before the enactment of the Lloyd-LaFollette Act, 5 U.S.C. 7501 (or as that occupied by probationary federal employees today: cf. *Sampson* v. *Murray*, 415 U.S. 61). See *Matter of Hennen*, 13 Pet. 230; *Keim* v. *United States*, 117 U.S. 290; *Eberlein* v. *United States*, 257 U.S. 82; *Myers* v. *United States*, 272 U.S. 52; *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886.

For example, in *Matter of Hennen*, *supra*, a federal district court clerk challenged his removal by the district judge; the judge had acknowledged the clerk's competence and that the appointment of a replacement clerk was motivated by purely personal considerations. This Court held that it had no power to review the grounds of removal, since, at that time, all

appointed federal officers held their positions solely "at the will and discretion of some department of the government" (13 Pet. at 259). Similarly, in *Keim* v. *United States, supra,* the Court refrained from reviewing the grounds for discharge of a federal employee, holding that federal personnel matters are "peculiarly within the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers" (177 U.S. at 296). More recently, the Court again affirmed the "settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer." *Cafeteria & Restaurant Workers Union* v. *McElroy, supra,* 367 U.S. at 896.

Although this case involves denial of re-enlistment, rather than removal, the applicable principle is the same. A personnel decision that is committed to the unfettered discretion of the supervisor is not subject to judicial review on the merits. See *Sims* v. *Fox*, *supra*, 505 F. 2d at 861. Respondent's military commander possessed such discretion to grant or deny ~~his~~ his application for re-enlistment. If, for example, the commander chose to deny respondent's application for re-enlistment because he was dissatisfied with respondent's job performance as a Technician, it was his prerogative to do so. That decision is not subject to judicial review to determine whether the dissatisfaction was reasonable or factually based, because

nothing in the statute or regulations imposes those kinds of limitations on the commander's discretion.

Similarly, nothing required the commander to base his decision solely or principally upon "military reasons"; like the district judge in *Matter of Hennen,* the commander had nonreviewable discretion ~~even~~ to base his decision even upon purely personal considerations unrelated to the subordinate's ability adequately to carry out his assigned responsibilities. The court of appeals therefore erred in remanding this case to the district court to determine whether the denial of respondent's application was based upon military or non-military grounds: even if it were determined that the denial had been based upon non-military grounds, respondent would have no right to re-enlist or even to reconsideration of his application.

B. IN ANY EVENT, THE DENIAL OF A NATIONAL GUARD TECHNICIAN'S APPLICATION FOR RE-ENLISTMENT FOR THE PURPOSE OF TERMINATING THE TECHNICIAN'S CIVILIAN EMPLOYMENT REPRESENTS AN EXERCISE OF NONREVIEWABLE MILITARY JUDGMENT

If this Court concludes, contrary to the foregoing analysis, that identifiable standards exist for adjudicating the correctness or propriety of a military commander's decision to deny an enlistee's application for re-enlistment, it should nevertheless reverse because the particular decision challenged here, even as characterized by respondent in his pleadings, represented an exercise of nonreviewable military judgment.

1. The judiciary historically has avoided unnecessary interference with military decisions

To avoid impairing the military's effectiveness, the federal judiciary historically has avoided unnecessary

interference with internal military decisions. *Orloff* v. *Willoughby,* 345 U.S. 83; *Robinson* v. *Resor,* 469 F. 2d 944 (C.A. D.C.); *Cortright* v. *Resor,* 447 F. 2d 245 (C.A. 2), certiorari denied *sub nom Cortright* v. *Froehlke,* 405 U.S. 965. See also *Burns* v. *Wilson,* 346 U.S. 137, 144. Cf. *Parker* v. *Levy,* 417 U.S. 733, 743. Judicial review of military decisions will not be undertaken absent a strong showing of a countervailing right. *Mindes* v. *Seamans,* 453 F. 2d 197 (C.A. 5); *Cortright* v. *Resor, supra.*

In particular, the courts have not reviewed military personnel decisions without strong justification. An allegation of deprivation of constitutional rights may provide a sufficient predicate for such review. *Orloff* v. *Willoughby, supra*; *Mindes* v. *Seamans, supra.* Similarly, federal courts will scrutinize such actions to determine whether the armed forces followed their own regulations and whether the deciding officers acted within the scope of their authority. *Harmon* v. *Brucker,* 355 U.S. 579; *United States ex rel. Schonbrun* v. *Commanding Officer,* 403 F. 2d 371 (C.A. 2), certiorari denied, 394 U.S. 929. But a military officer's otherwise lawful actions will not be reviewed by the judiciary merely upon the claim of arbitrary or capricious abuse of discretion. See *Turner* v. *Egan, supra*; *Reaves* v. *Ainsworth,* 219 U.S. 296. As this Court stated in *Orloff* v. *Willoughby, supra,* 345 U.S. at 93–94:

> We know that from top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism or other objectionable handling of men. But judges are not given the task of running the Army. * * * Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.

At bottom, respondent's claim appears to be that he was injured by his commanding officer's abuse of an overly broad discretion. In the absence of a clear congressional directive to the contrary, that is the kind of contention that historically has been treated as nonjusticiable in the military context. In undertaking review, however, the court of appeals concluded that "[t]he primary rationale for the doctrine of nonreviewability of military decisions lies in the civil courts' 'unwillingness to second-guess judgments requiring military expertise' * * * [b]ut decisions which are made for non-military reasons involving no application of military expertise [are] outside the boundaries of the doctrine of nonreviewability" (Pet. App. A, pp. A–4 to A–5).

In our view, the court of appeals erred in several respects in reaching and applying this conclusion. First, we believe that the judiciary is ill-equipped to attempt to determine whether the reasons for a given military decision are military or non-military. The determination whether a particular military judgment did or did not require the "application of military expertise" may itself require military expertise. Judicial efforts at making such determinations would pose the risk of uninformed meddling in matters of genuine military concern. Cf. *Gilligan* v. *Morgan,* 413 U.S. 1.

Moreover, the rule adopted by the court of appeals would open a Pandora's box of judicial review: every military decision would become subject to review to determine whether, in the eyes of the reviewing court, the reasons for the decision were suitably "military." We see no reason to impose this burden upon either the military or the courts. The better approach is the one represented by this Court's decisions: in the absence of a strong showing of countervailing right, a military decision is nonreviewable without any requirement that the military make a particularized showing that the decision involved application of military expertise.

Second, contrary to the opinion of the court of appeals, military personnel decisions, and especially decisions on applications for re-enlistment, inherently require the exercise of military expertise. The decision on who is to remain in the military unit and who is to leave requires consideration of a wide range of factors bearing upon effectiveness and morale, many of which entail subjective evaluation. Such decisions involve the commander's seasoned military judgment concerning the needs of the unit. Cf. *Orloff* v. *Willoughby*, *supra*, 345 U.S. at 94. Judicial reconsideration of such decisions would impede the most basic of military functions, the mustering of the force.

Third, whatever may be the rule with respect to military personnel decisions generally, a decision to deny a National Guard Technician's application for re-enlistment, for the purpose of expeditiously terminating the Technician's "civilian" employment,

plainly involves the application of military expertise. It is to this argument that we now turn.

2. The decision to terminate a National Guard Technician's employment serves a predominantly military purpose

A military commander's decision to deny a soldier's application for re-enlistment could be based upon one of any of a number of factors or upon a matrix of considerations. Respondent's only allegation here, however, is that he was denied re-enlistment for the purpose of expeditiously removing him from his position as a National Guard Technician without a showing of cause. But the purpose of expeditiously removing an unsatisfactory Technician is manifestly military. Thus, even under its own rationale, the court of appeals erred in vacating and remanding to the district court.

We have already described the responsibilities of a National Guard Technician. See pp. 5–7, *supra*. Those obligations are military in nature: the Technician is a member of the National Guard unit who, in order to maintain the unit's combat readiness, carries on the work of the unit during the civilian work week while the other members are engaged in unrelated employment. The Technician is responsible both for the unit's operational functions and for training his fellow soldiers. Accordingly, satisfactory performance by the Technicians of their job responsibilities is crucial to the military preparedness of the National Guard.

Because of the literally inextricable interrelationship of respondent's military responsibilities as a soldier and his "civilian" responsibilities as a Technician, his performance as a Technician necessarily

affected the military efficiency of his unit and therefore was an appropriate military consideration in determining whether his re-enlistment would be in the unit's best interest. Although respondent's performance as a Technician may not have been sufficiently unsatisfactory to warrant his removal from that position for cause during his term of enlistment, his competency in that role was a proper military criterion for determining whether to continue his civilian employment upon the expiration of his contract and whether to accept his application for re-enlistment.

Thus even if, as the court of appeals held, military personnel decisions may be reviewed by the courts to determine whether they were based upon military or non-military grounds, and, in the latter case, whether they were arbitrary or capricious, the grounds alleged by respondent in his complaint were military and therefore the decision he challenges is beyond the reach of judicial review.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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